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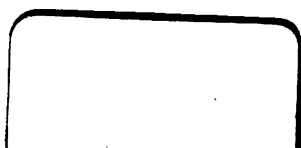
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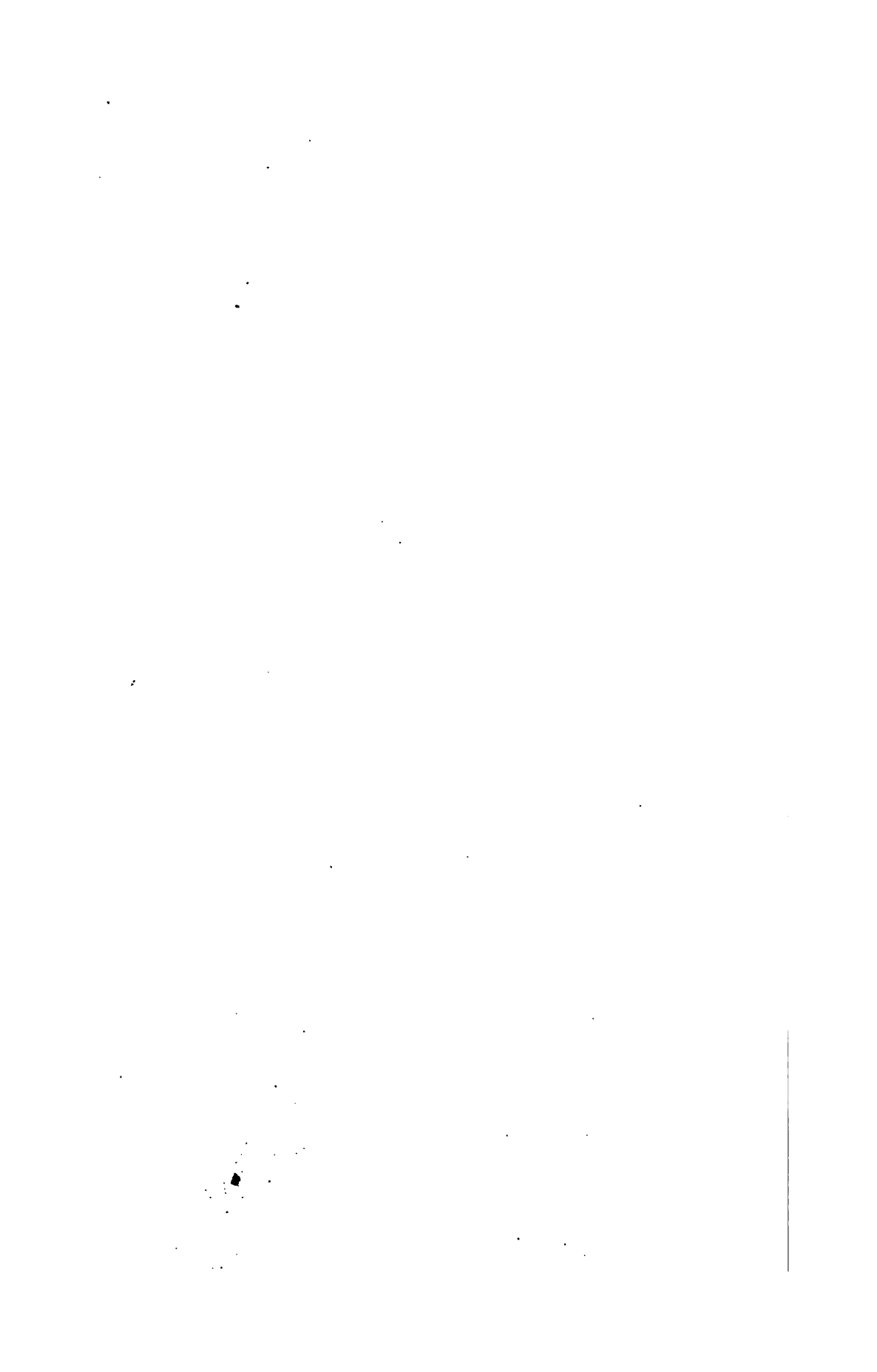


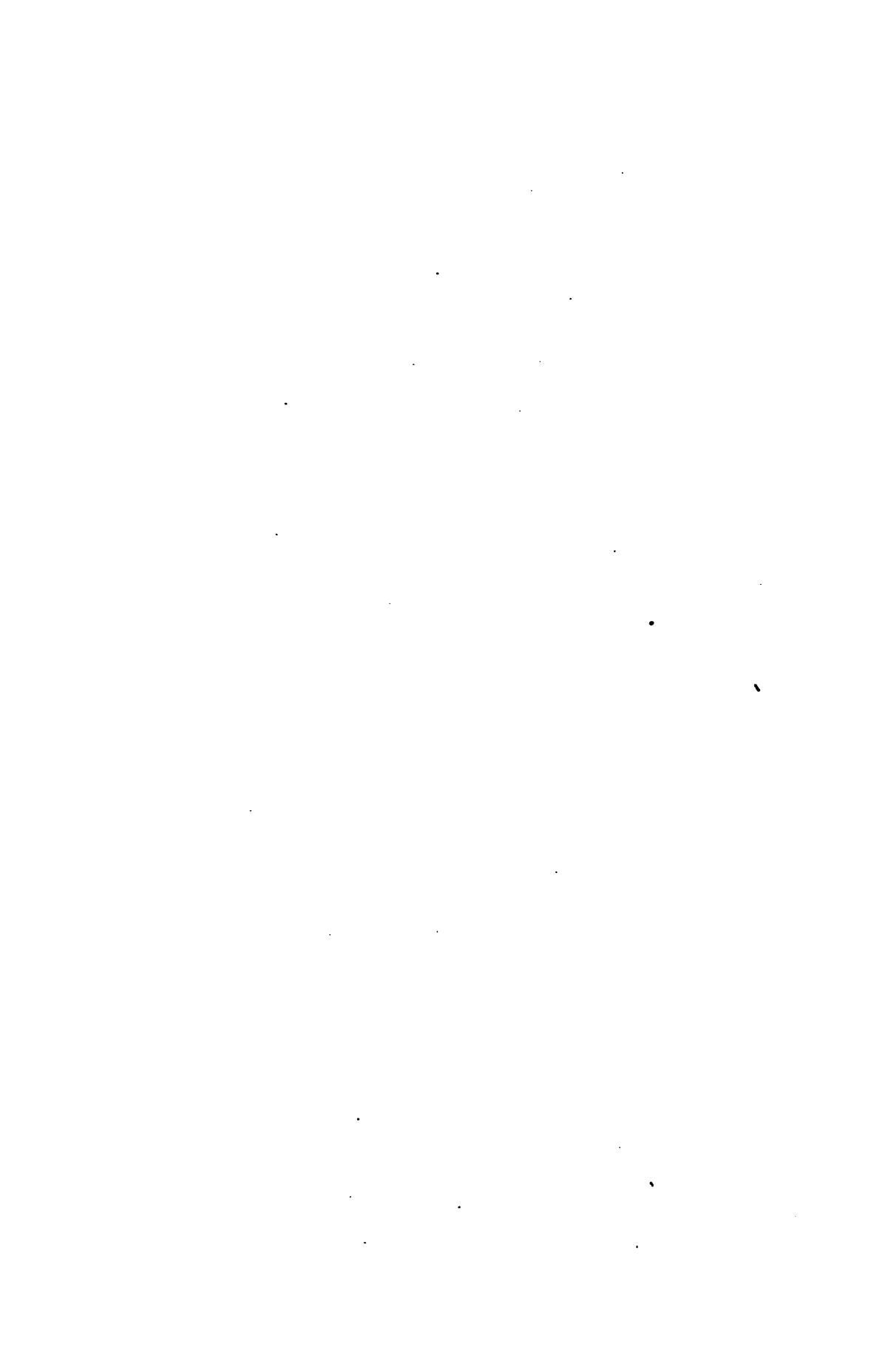
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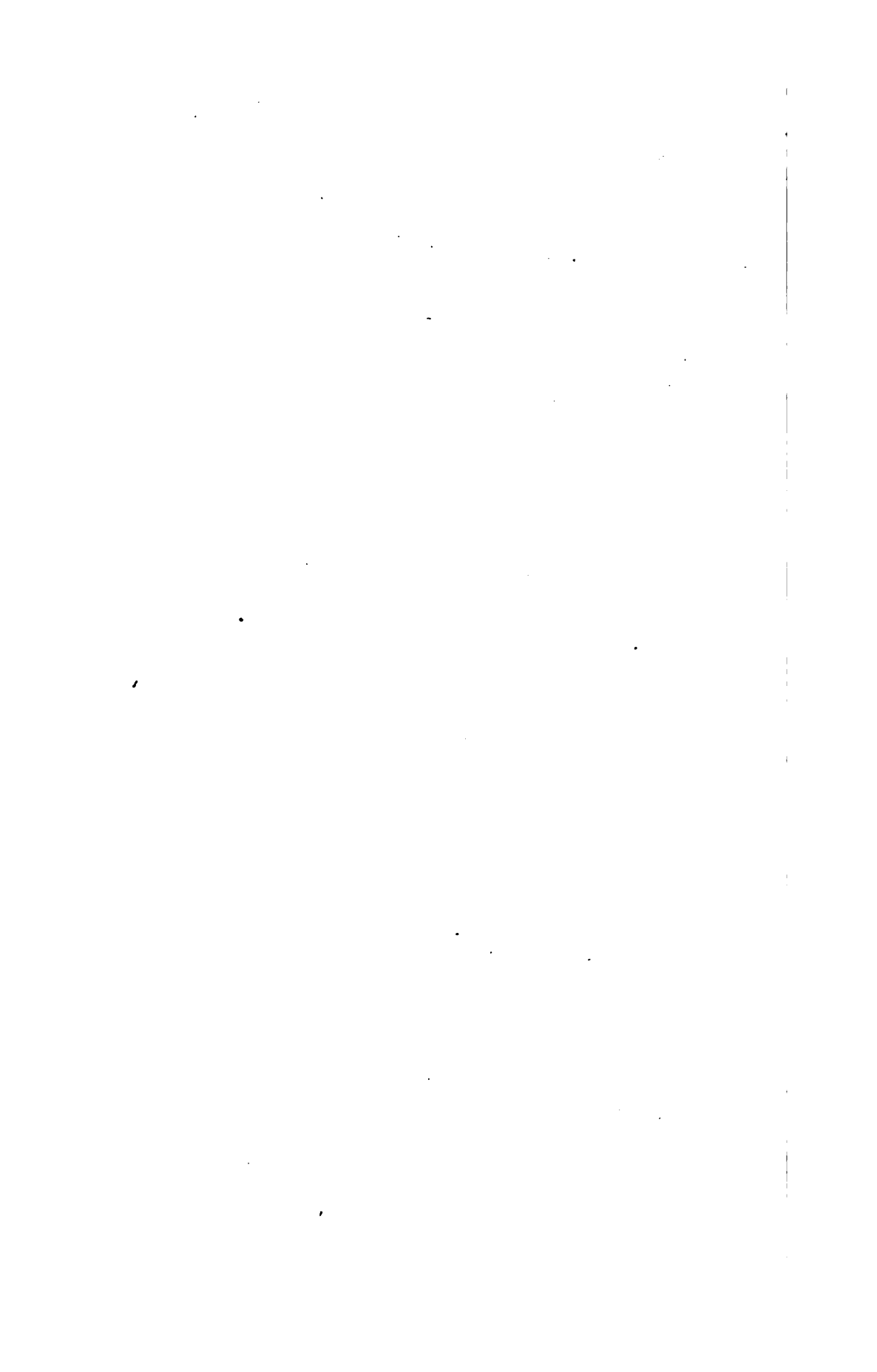
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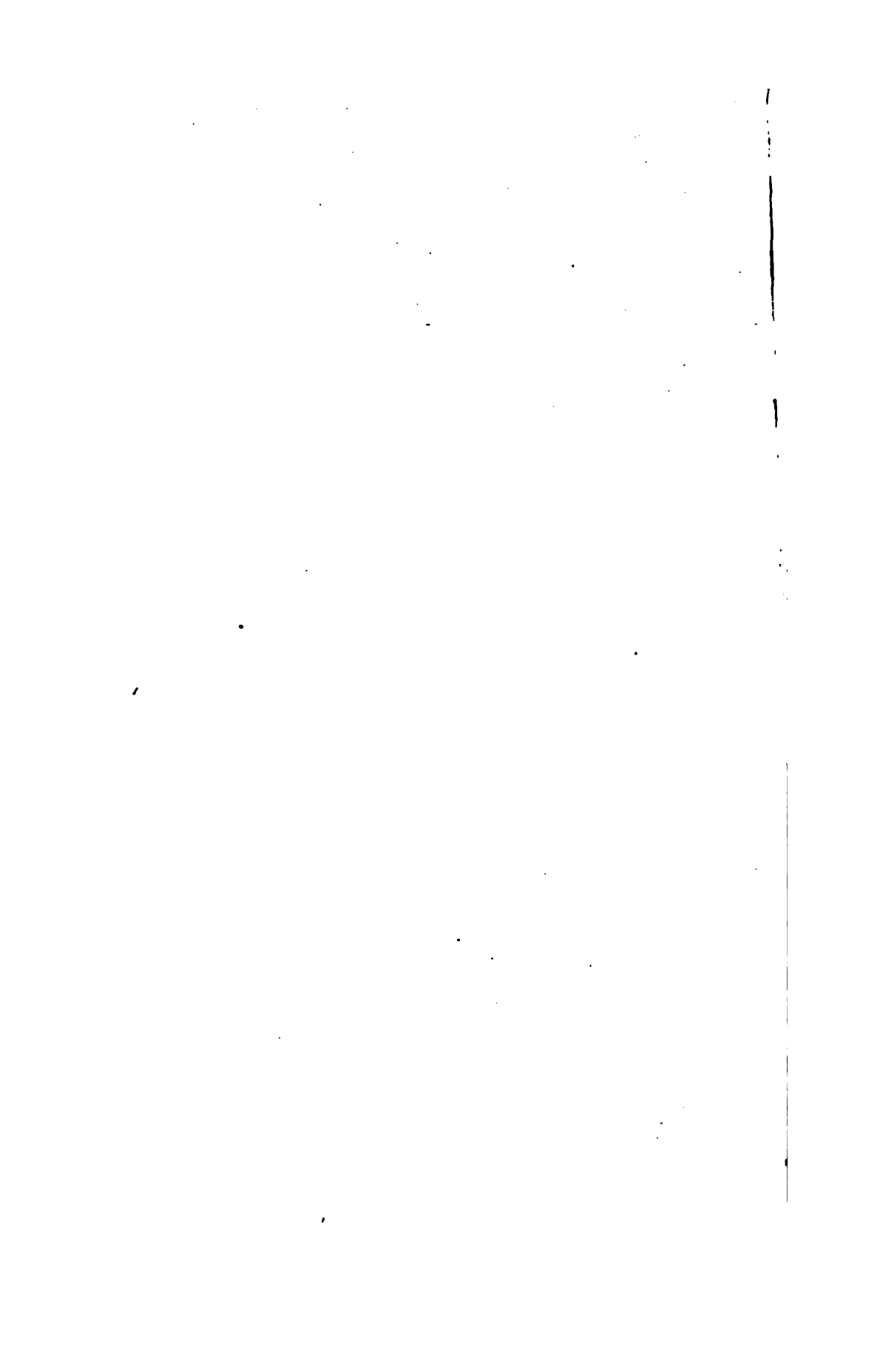




NEW JERSEY EQUITY REPORTS.

VOLUME XXXIV.

STEWART, 7.



NEW JERSEY EQUITY REPORTS.

VOLUME XXXIV.

STEWART, 7.

ERRATA.

Midland R. R. Co. v. Hitchcock, 280 (23), for "an actual breach," read "an action for breach."

Gray v. Gray, 282 (13), for "5 Stew. Eq. 692," read "*Gray v. Gray*, May Term, 1880, unreported."

The following rule was adopted at the June Term of the Court of Errors and Appeals:

19½. No respondent shall be entitled to the dismissal of an appeal from any interlocutory order or decree, upon the ground that such appeal was not made within the time limited by law, unless he shall, within thirty days after service of the petition of appeal, give notice of such objection to the appellant or his solicitor, and shall present the objection to the court at the next term thereafter; and upon receipt of such notice, the appellant shall be absolved from the duty of prosecuting the appeal, until after the then next term of the court. But this rule is not to be regarded as interfering with the right of the court to dismiss an appeal for the cause aforesaid, at any time, upon such terms as may be just.

REPORTS

—OF—

CASES DECIDED IN

THE COURT OF CHANCERY,

THE PREROGATIVE COURT,

AND, ON APPEAL, IN

The Court of Errors and Appeals,

—OF THE—

STATE OF NEW JERSEY.

JOHN H. STEWART, REPORTER.

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NOTE.

This volume contains the opinions delivered in the Court of Chancery and Prerogative Court, at May and October Terms, 1881, and also those on appeal in the Court of Errors and Appeals at June and November Terms, 1881.

By the Chancellor's direction, the opinions in the following cases have been omitted:

May Term, 1881.—*Davis v. Ogden, Wells v. Wells, Whalen's Case*, (Vice-Chancellor Dodd).

October Term, 1881.—*Hemingway v. McDevitt*.

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CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
MAY TERM, 1881.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAM V. VAN FLEET, ESQ., VICE-CHANCELLOR.

AMZI DODD, ESQ., VICE-CHANCELLOR.

FANNY JOSEPH et al., executors of Meyer Trieste, deceased,

v.

JEANNETTE UTITZ et al.

A testator divided his estate into four shares, gave one share to each of his three daughters, and directed his executors to invest the fourth share, and to pay the interest thereon to his son for life, and at his son's death, to pay the principal of that share to his three daughters, "or their heirs," equally; and "in case of the death of any of my said daughters before my decease, or before the death of my son, or before receiving her bequest, leaving lawful issue, such issue is to take the bequest or share to which his, her or their mother would be entitled, if living." One daughter died testate, after the testator, but before actually receiving her share, leaving lawful issue.—*Held*, that her share vested in her at the testator's death, and was payable to her executors, and not to her issue.

Joseph v. Utitz.

Bill for construction of will and directions to executors.

Messrs. Guild & Lum, for complainants.

Mr. F. A. Johnson, for Wm. Utitz.

THE CHANCELLOR.

Meyer Trieste, late of Newark, died in December, 1878. By his will he gave all his real and personal estate, subject to and charged with the payment of his debts and funeral expenses, and certain pecuniary legacies, in the following shares: One-fourth to each of his daughters, Fanny, Cecilia and Rosa, and their heirs and assigns forever, and the other fourth to his executors, or such of them as should qualify, in trust, to invest it, and pay the interest to his son Phineas for life, and at the death of Phineas, to divide the principal among his daughters, "or their heirs," in equal parts or shares. And he provided as follows:

"In the case of the death of any of my said daughters before my decease, or before the death of my son Phineas, or before receiving her bequest, leaving lawful issue, such issue is to take the bequest or share to which his, her or their mother would be entitled, if living."

Prior to September 2d, 1879, the executors paid all the debts and pecuniary legacies, and nothing remained after that date but to convert the personal estate into cash and make division, which might have been done at almost any time during the year 1880. It was deferred merely in order that one of the executors, who resided in Georgia, might be present, and take part therein. In December, 1880, Rosa, one of the testator's daughters, died testate, leaving a husband and children. The question is, whether the one-fourth of the estate given to her by her father's will, is payable to her children or to her executors. The gift is to her, and vested in her, at the testator's death. The testator, indeed, provides that in case any of his daughters shall predecease him or Phineas, or die before receiving her share, it shall go to her issue. His general object in this provision was probably to prevent a lapse, which he seems to have thought would

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be occasioned by the death of any of his daughters in his lifetime. He must be presumed to have intended that his daughters' shares in the one-fourth given in trust should go to their issue if they should predecease their brother, but he did not intend that their title to the shares, given to them directly and vesting in them on his death, should be defeasible by their death in the lifetime of their brother. Those shares vested in them on the death of the testator, and were payable to them in due course of administration of his estate, and Rosa's title to her share was not defeated by her dying before the division was actually made. *Wms. on Ex. 1288*; *Hutchin v. Mannington*, 1 *Ves. jun. 366*; *Miller v. Coll*, 5 *Stew. Eq. 6*; *S. C., on Appeal*, 6 *Stew. Eq. 362*. In *Hutchin v. Mannington*, the testator left the residue to his father, for his own proper use and benefit, but "in case of his death before he might have received it," gave it over to his, the testator's, brothers and sisters, and their children. The testator died in or about 1781, and his father in 1784, without having received any part of the residue. The bill was brought by the brothers and sisters of the testator, who claimed the residue upon the event of the father dying before he received it. Lord Eldon considered the residue as vested in the father from the death of the testator. In *Miller v. Coll*, a share of the testator's estate was limited over in case of the legatee's death without issue before distribution, and it was held that the share would not go over in case of his death without issue after distribution might have been made, although it was before distribution was actually made. In the case in hand, the distribution might in fact have been made before Rosa's death, and that it was not made was due merely to the fact that the executors delayed it. The complainants will be directed to pay the share in question over to the executors of Rosa.

Smith v. Muirheid.

CHARLES E. SMITH

v.

CHARLES H. MUIRHEID et al.

Upon a judgment recovered in Pennsylvania an attachment was issued out of the supreme court of New Jersey, to reach defendant's interest in certain lands in this state.—*Held*, that a creditor's bill to set aside defendant's conveyance of those lands to his brother, shortly before the action in Pennsylvania was begun, was sustainable under the lien of the attachment, and that the insolvency of the defendant was not a material fact, or necessary to be proved.

Bill for relief. On final hearing on pleadings and proofs.

Mr. B. Gummere, for complainant.

Mr. A. G. Richey and *Mr. J. Wilson*, for defendants.

THE CHANCELLOR.

This is a suit in aid of an attachment. The complainant recovered judgment against the defendant Charles H. Muirheid, in the court of common pleas of Philadelphia, December 31st, 1878, for \$18,886.60, on a promissory note for \$30,000 and interest, given by the latter to the former, July 10th, 1873, and payable twelve months from date. He issued a foreign attachment (the defendant in the judgment being a non-resident) out of the supreme court of this state, February 7th, 1879. By virtue thereof, the property and estate of Charles H. Muirheid, in a farm of two hundred and seventeen and twenty-four hundredths acres, or thereabouts, in Hopewell township, in Mercer county, was attached. Judgment was entered in the attachment December 9th, 1879, for \$19,780.99, besides costs. The object of this suit is to reach, in aid of the attachment, the interest of Charles H. Muirheid in that property, which, according to the

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allegations of the bill, was fraudulently and with intent to hinder and delay the creditors of the grantor, conveyed by Charles H. Muirheid to his brother, the defendant William H. Muirheid, by deed dated March 16th, 1877. The bill waives answer on oath. It appears from the evidence that the farm was owned by John G. Muirheid, the father of the parties to that deed (whose homestead it was), up to his death, which occurred in November, 1866. He left six children and the children of a deceased daughter. Soon after his father's death, Charles purchased the interests of the other children and the children of his deceased sister in the real and personal estate, at \$2,000 for each of the six shares. At the father's death the family living on the farm consisted of the widow, a daughter named Sarah, and a son named John and his wife, and William. John and his wife, however, soon moved away.

For the price of the shares of Sarah and William, Charles gave to them together a mortgage on the farm. It was agreed between Charles and William at the time of the purchase that in order to keep the family together on the homestead, William should take charge of the property and cultivate and manage the farm. William says that for this service Charles was to compensate him fully, and that the superintendence and management of the property were to be subject and according to the wishes and directions of Charles, and that Charles was to have the privilege (as William expresses it) of coming to the farm with his family whenever he chose. William says Charles availed himself of the privilege by coming with his wife, her maid, his coachman and horses, and sometimes bringing also a friend of his wife, and they would stay six weeks at a time. This arrangement continued for ten years, up to March, 1877. The widow died, however, in 1872. In March, 1877, Charles agreed to sell the farm and his personal property there to William for \$12,000, and he caused a deed for them to be drawn accordingly, and also a mortgage to himself on the same property for the \$12,000, the whole of the purchase-money. The deed purported to convey the farm and "all the live stock, farming utensils and furniture, including all manner of personal

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property on the farm." It was sent to him at Philadelphia, where he lived, to be executed, and he executed it accordingly.

After it was returned, William executed the mortgage. In May or June, 1877, Charles and William had what the latter calls a "settlement," in which William insisted that the price at which the property had been sold to him was too high, and more than it would bring in the market, and it was accordingly agreed between them that there should be a deduction of \$2,000 from the price on that account, the amount to be credited on the mortgage. It was then also agreed that William was entitled to \$2,000, or \$200 a year, from Charles for his compensation for the ten years' services he had rendered under the agreement for cultivating and managing the farm; that amount also to be paid by a like credit. It was also agreed that William should have allowance in the same way for the \$2,000 secured to him by the mortgage given to him and Sarah by Charles, as before mentioned. The aggregate of these sums, \$6,000, was then credited upon the mortgage of \$12,000. That mortgage was subsequently assigned to Margaret E. Rhoads, of Germantown, Pennsylvania, by whom it is now held. On the hearing, her title to it as a valid security was not questioned, but admitted.

That Charles H. Muirheid, when he made the conveyance to William, owed the complainant a large sum of money which he was unable to pay, is abundantly proved. It seems quite clear that he was anxious to put the property beyond the reach of his creditors. He made the conveyance only about three weeks before the complainant began suit against him in Philadelphia. He took a mortgage for the whole purchase-money. He sold the property, real and personal, without inventory or appraisement.

The personal property, consisting of live stock, farming utensils, grain &c., appears to have been worth \$1,200 at least. In this connection it may be added that the deed purports to convey furniture, when, in fact, Charles owned none there. The reason for that, according to William's statement, was that he might be sure to cover everything. The consideration of the deed, if not fixed by Charles himself alone, was agreed to by

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William with so little consideration that the latter, in the settlement, successfully insisted upon a deduction of \$2,000 from the price, on the ground that it was so much more than the property would bring in the market. The bill, as before stated, waives answer on oath, and the defendants have not seen fit to produce Charles as a witness. We have therefore no statement on oath from him. William denies all fraud, and testifies that when he bought the property he not only did not know that Charles owed the complainant anything, but did not know that he was indebted to anybody. It is urged in his behalf that in buying the property he was innocent of any design to defraud, and therefore is entitled to hold it against the complainant and all other creditors of Charles. And it is further insisted that, inasmuch as it is not made to appear that Charles is insolvent, William cannot be disturbed in his title to the property by the complainant in this suit. As to the first point: A conveyance, to be good against existing creditors, must be upon good consideration and *bona fide* also. It is not sufficient that it be upon good consideration or *bona fide*—it must be both; and if it be defective in either particular, although valid between the parties and their representatives, it is invalid as to existing creditors. *Sayre v. Fredericks*, 1 C. E. Gr. 205; *Randall v. Vroom*, 3 Stew. Eq. 353; *Story's Eq. Jur.* § 353. In view of the circumstances it is difficult to believe that William had not, when the conveyance was made, any knowledge or understanding that there was a reason arising from, or connected with, Charles's pecuniary embarrassments, for the transfer which was apparently suddenly, if not hastily, made on the part of Charles; and it was certainly inconsiderately accepted on William's part.

It is urged that such knowledge on the part of the grantee will not make a transfer fraudulent as against creditors, even though the grantor's design was fraudulent, and *Merchants Bank v. Northrup*, 7 C. E. Gr. 58, is cited as an authority; but, in that case, it appeared that a valuable consideration was paid, and that the conveyance was *bona fide*, and what was said by the court on the subject of knowledge had express reference to a case where there was a *bona fide* conveyance for valuable

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consideration. In the case in hand, William had never sought to buy the property. The proposition to sell came from Charles, and it appears to have been acted upon at once, and, on the transfer, William gave Charles a mortgage for the whole of the purchase-money, although, as he says, Charles at the time owed him \$2,000 on the mortgage given to him and Sarah by Charles for purchase-money, and was indebted to him in a large sum for his services. There is further reason to conclude that the transfer was not *bona fide* on the part of William in the allowance of \$2,000 made to him with respect to his services, just referred to, as superintendent and manager of the farm. He testifies that he had, during all those ten years, the entire products of the farm, except what went for the supply of the table. He kept no account of them. He never rendered any account of his stewardship, and it does not appear that any was ever required of him. The family, after the death of the mother in December, 1872, consisted of only himself and his wife and his sister Sarah. He never made any demand on Charles for compensation, and Charles never paid him anything on account of it. He had no written evidence of the agreement on which the claim was based. Even in the settlement of 1877 there was no account of his receipts or expenditures. On the allowance of \$2,000 for services, no receipt or discharge was taken, except, perhaps, in the endorsement of the credit, which is not before me. That allowance, on account of the consideration, cannot be regarded as having been made *bona fide*. There is too much evidence of fraud in the transaction to permit the conveyance to stand as valid as against the complainant.

As to the second point, that it does not appear that Charles is insolvent, the complainant comes, as before stated, into court, to obtain its assistance in aid of the lien he has obtained under the attachment. His bill is filed for the benefit of himself and such other creditors of Charles as shall join in this suit. It merely seeks to remove a fraudulent deed and mortgage out of the way of the attachment. It has repeatedly been decided that such a suit is maintainable. *Williams v. Michenor*, 3 Stock. 520;

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Roberts v. Hodges, 1 C. E. Gr. 299; *Curry v. Glass*, 10 C. E. Gr. 108. In *Williams v. Michenor* it was said :

"The aid of this court is sought to disembarass the title of the difficulties which the debtor has thrown around it for the purpose of defrauding his creditors. If the auditor should sell the property as the title now stands, with the defendant's interest in the property uncertain and a matter of controversy, and with claims upon it unadjusted, it is manifest the property must be sacrificed. This court can relieve the title of all such difficulties. It can adjust all claims upon the property, and secure their payment. It can ascertain what interest the defendant has in the property, and what portion of it ought legally and equitably to be sold under the attachment. It is for the benefit of all parties interested that this should be done before the property is sold. It can be done only by this court. This court alone can make the attachment of any real advantage to the creditors. Its aid is properly invoked to assist the complainants in their legal remedy."

It is obvious that in such a suit as this it is a matter of no importance whether the debtor is insolvent or not. The complainant is entitled to the assistance of this court in aid of his legal remedy. The property should be sold subject not only to the amount due Mrs. Rhoads on the mortgage of \$12,000, but also to the money due William on the mortgage given to him and Sarah, and the proceeds applied to the payment of the judgment in attachment. By the answer it is said that there was a little over \$2,000 due William on the latter mortgage at the settlement in 1877. It does not appear whether the claim of Sarah to \$2,000 and interest under that mortgage has been in any way satisfied. She is not a party to this suit. By the answer it is stated that on the settlement between William and Charles, in 1877, that mortgage was produced and canceled of record. If she has any equity to be protected in the premises, she must be left to assert her right. As to the personal property, the attachment is not a lien upon it, and the bill being filed merely in aid of the lien of the attachment, there can be no relief granted in reference to that property. The complainant is entitled to costs.

Ferdon v. Miller.

JOHN W. FERDON

v.

AGNES M. MILLER et al.

A married woman, in order to enable her husband to procure his portion of the capital of a partnership, gave a mortgage on her separate estate to her husband's partner, to be used for the purpose. He obtained the money from the complainant on an assignment of the mortgage—*Held*, that an agreement between the partners and the mortgagor as to the payment of the mortgage out of the husband's profits of the firm's business, could not affect the title or interest of the complainant in the mortgage, he having had no notice of such agreement at the time of the assignment.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. C. H. Voorhis, for complainant.

Mr. R. O. Babbitt, for defendants.

THE CHANCELLOR.

In March, 1875, Christopher R. Miller and John Ferdon en-

NOTE.—The text-books and cases cited therein agree that, generally speaking, a wife may mortgage her separate estate to secure her husband's debt, 1 *Bishop on Mar. Wom.* §§ 604, 874; 1 *Jones on Mort.* §§ 109, 110, 113, 114; 2 *White & Tudor's Lead. Cus. in Eq.* 1922. And the later cases, where there exists no statutory prohibition, confirm the same doctrine, *Voorhis v. Granberry*, 5 *Baxter* 704; *Molloy v. Clapp*, 2 *Lea* 586; *McFerrin v. White*, 6 *Coldw.* 499; *Layman v. Schultz*, 60 *Ind.* 547, and cases cited; *Brick v. Scott*, 47 *Ind.* 299; *Nippel v. Hammond*, 4 *Colorado* 211; *Rudford v. Curwile*, 13 *W. Va.* 572; *Williams v. Urnston*, 35 *Ohio St.* 296; *Hall v. Eccleston*, 37 *Md.* 510; *Kerehner v. Kempton*, 47 *Md.* 568; *Kinner v. Walsh*, 44 *Mo.* 65; *Wilcox v. Todd*, 64 *Mo.* 338; *Purvis v. Carstaphan*, 73 *N. C.* 575; *Mebane v. Mebane*, 80 *N. C.* 34; *Black v. Galwey*, 24 *Pa. St.* 18; *O'Hara v. Baum*, 88 *Pa. St.* 114; *Burnett v. Haupe*, 25 *Gratt.* 481; *Fraser v. Fishburne*, 4 *Rich. (N. S.)* 314; *Witsell v. Charleston*, 7 *Id.* 38; *Nourse v. Henshaw*, 123 *Mass.* 96; *Hassey v. Wilke (Cal.)*, 10 *Reporter* 521; *Rhodes v. Gibbs*, 39 *Tex.* 432; *Leffingwell v. Freyer*, 21 *Wis.* 398; *Stephen v. Beall*, 22 *Wall.* 329; *Daniels v. Henderson*, 5 *Fla.* 452; *Campbell v. Tumpkins*, 5 *Stew. Eq.* 170, 6 *Id.* 362; *Stone v. Montgomery*, 35 *Miss.* 83; *Butterfield v. Stanton*, 44 *Miss.* 16.

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tered into copartnership in business, in New York. It was agreed between them that each should contribute half of the capital, which was to be \$3,000. Miller not having the money to contribute his share, it was agreed between them that he and his wife should give Ferdon their bond, secured by mortgage on property in Jersey City, the title to which was in Mrs. Miller, to secure payment of \$1,500, to enable Ferdon to raise it. The bond and mortgage were given accordingly, and Ferdon having raised the money on his note for \$2,000, endorsed for his accommodation by the complainant, and the security of a \$1,000 government bond, borrowed by him from J. W. Littlefield, the return of which bond the complainant guaranteed, and the note being still unpaid and the bond unreturned, Ferdon assigned the bond and mortgage to the complainant in November, 1875, to secure him against his liability upon his endorsement and guaranty. The complainant, subsequently to the assignment, paid the note, and paid to Littlefield \$1,000, in discharge of his obligation upon his guaranty, to enable Littlefield to redeem the government bond. The bond and mortgage were payable in two years from their date, March 1st, 1875, with interest payable semi-annually, and contained a provision that in case of default for thirty days in the payment of interest, the principal should, at the option of the holder, be due immediately, and also a provision giving to

The contrary doctrine is held under the Alabama statute, *Mitchell v. Lippincott*, 2 Woods 467; 1 Cent. L. J. 303; *Wilson v. Knight*, 59 Ala. 172; *Thames v. Rembert*, 63 Ala. 562; *Blakeslie v. Mobile Co.*, 57 Ala. 205; *Williams v. Bass*, Id. 487; and the Georgia statute, *Dunbar v. Mize*, 53 Ga. 435; *Campbell v. Murray*, 62 Ga. 86; *Veal v. Hurt*, 63 Ga. 738; and the Mississippi statute, beyond the wife's income, *Erwin v. Hill*, 47 Miss. 675; *McDuff v. Beauchamp*, 50 Miss. 531; *Hand v. Winn*, 52 Miss. 784; *Klein v. McNamara*, 54 Miss. 90; *Stephenson v. Miller*, 57 Miss. 48; see *Lightfoot v. Bass*, 2 Tenn. Ch. 677.

Where the mortgage covers lands of both husband and wife, *William and Mary College v. Powell*, 12 Gratt. 372.

Where the indebtedness of the husband is future, *Hoffey v. Carey*, 73 Pa. St. 431; or past, *Wilhelm v. Schmidt*, 84 Ill. 183; *Eisenlord v. Snyder*, 71 N. Y. 45; *Mize v. Hawkins*, 54 Ga. 500.

The *lex rei sitæ* governs, *Frierson v. Williams*, 57 Miss. 451; see *Bell v. Puckard*, 69 Me. 105; *Burchard v. Dunbar*, 82 Ill. 451.

Only the wife can take advantage of her coverture as a defence, *Ricketson*

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the Millers the right to pay the principal before it should become due, in installments of not less than \$200.

The defence made to this suit, which is brought to foreclose the mortgage, is, first, that the mortgage cannot be enforced, because it was given by Mrs. Miller upon her separate estate, and is, as she insists, a mere promise to pay the debt or answer for the default of her husband; and next, that the bond and mortgage were given on the understanding that the firm was to make use thereof, if necessary, for business purposes, until Miller's share of the net profits should amount to the sum named in the bond and mortgage, and then they were to be delivered up for cancellation; and it is alleged that in September, 1875, before the assignment to the complainant, Miller's share of the net profits amounted to \$2,600, and it was agreed between him and John Ferdon that \$600 of that amount should be applied to the payment of the bond and mortgage, and the balance remain in the hands of the firm subject to Miller's order, to be drawn out by him if he should wish to do so, and that Miller did not draw it out, but John Ferdon held it, and ought to have applied it to the payment of the bond and mortgage, and informed the Millers that he had done so, and promised to return the bond and mortgage to them.

A married woman may, with her husband, mortgage her land

v. Giles, 91 Ill. 154; *McGarock v. Whitfield*, 45 Miss. 452; *Whitworth v. Carter*, 43 Miss. 61; *Campbell v. Babcock*, 27 Wis. 512; *Denison v. Gibson*, 24 Mich. 187; *Stewart v. Boyle*, 23 La. Ann. 33; *Kerchner v. Kempton*, 47 Md. 563.

CONTRA: *Ragsdale v. Gossett*, 2 Lea 729; *Third National Bank v. Blake*, 73 N. Y. 260; *Coats v. McKee*, 26 Ind. 223; *Brookings v. White*, 49 Me. 479; *Claverie v. Gerodius*, 30 La. Ann. 291; *Jenz v. Gugel*, 26 Ohio St. 527; *Williams v. Hugunin*, 69 Ill. 214; *Doyle v. Kelly*, 75 Ill. 574; *Taylor v. Boardman*, 92 Ill. 566; *Sweazy v. Kammar*, 51 Iowa 642; *Yale v. Dederer*, 68 N. Y. 329; *Second Nat. Bank v. Miller*, 2 N. Y. Sup. Ct. 104; *Smith v. Williams*, 43 Conn. 499; *Foxworth v. Magee*, 44 Miss. 430.

So, where the obligation is jointly signed by the husband and wife, *Bressler v. Kent*, 61 Ill. 426; *Schmidt v. Postel*, 63 Ill. 58; *Hennessey v. Ryan*, 7 R. I. 548; *Rhodes v. Gibbs*, 39 Tex. 432; *Davies v. Jenkins*, L. R. (6 Ch. Div.) 728; *Viser v. Scruggs*, 49 Miss. 705; *Agnew v. Merritt*, 10 Minn. 308.

A married woman cannot become surety on a guardian's bond, *Gosman v. Conger*, 7 Hun 60, 69 N. Y. 87.

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to secure the payment of his debt, or the debt of any other person, for the payment of which she is in no way liable, and in which she has no interest. *Jones on Mort.* § 113. And her mortgage, given to secure the payment of the bond of her husband, will not be regarded as without validity or binding effect, simply because the consideration of the bond is an obligation merely moral, and not enforceable at law or in equity. *Campbell v. Tompkins*, 5 *Stew. Eq.* 170; *S. C.*, affirmed, 6 *Stew. Eq.* 362. Mrs. Miller's mortgage of her separate estate, made for the purpose of being negotiated, is clearly valid against her in the hands of a *bona fide* assignee for value.

As to the other ground of defence: Mrs. Miller herself says that John Ferdon was to use the bond and mortgage as security for the \$1,500, until the time when Miller's share of the net profits should amount to that sum, and, if necessary, he was to raise money on them. Again, she says they were given to enable Miller to go into business with Ferdon, to secure Miller's share of the capital; that he was to put in \$1,500, and did put it in, by giving the mortgage. Miller says the mortgage was given to Ferdon as a collateral to enable him to raise money, and that the mortgage represented half of the capital, and he also says that Ferdon was to take the mortgage and raise money, if necessary, for the firm. He says he understood that Ferdon procured \$1,500 for

As to an appeal bond, *Woolsey v. Brown*, 11 *Hun* 53.

A note, without reference to her separate estate therein, is sufficient to charge her as such surety, *Bishop on Mar. Wom.* § 878; *Williams v. Urmston*, 35 *Ohio St.* 296; *Metropolitan Bank v. Taylor*, 62 *Mo.* 338; *Burnett v. Hawpe*, 25 *Gratt.* 481; *Hall v. Eccleston*, 37 *Md.* 510; *Major v. Holmes*, 124 *Mass.* 108; *Willsey v. Hutchins*, 10 *Hun* 502; *McVey v. Cantrell*, 70 *N. Y.* 295; *Williams v. King*, 43 *Conn.* 569; *Radford v. Carwile*, 13 *W. Va.* 644.

Fraud or duress employed to obtain the wife's signature, annuls the instrument, *Levi v. Earl*, 30 *Ohio St.* 147; *Singer Manf. Co. v. Rawson*, 50 *Iowa* 634; *Smith v. Osborn*, 33 *Mich.* 410; *Linn v. Blizzard*, 70 *Ind.* 23; *Mersuran v. Werges*, 3 *Fed. Rep.* 378; *Barth v. Kasa*, 30 *La. Ann.* 940; *Hammit v. Bull*, 8 *Phila.* 29. See *Wright v. Pennington*, 12 *Vr.* 48, 14 *Vr.*; *Comegys v. Clarke*, 44 *Md.* 108; *Freeman v. Wilson*, 51 *Miss.* 329.

But not in the hands of an innocent holder, *Conn. Life Ins. Co. v. McCormick*, 45 *Cal.* 580; *Finnegan v. Finnegan*, 3 *Tenn. Ch.* 510; *Spurgin v. Traub*, 65 *Ill.* 170.—[REP.

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him for his share of the capital. The proof is that Ferdon obtained it by means of the complainant's endorsement and guaranty before mentioned, to secure which the bond and mortgage were assigned. It appears by the books of the concern that Miller is credited, under date of March 15th, 1875, with the \$1,500, as so much cash put in by him, and Ferdon has a like credit under the same date. Both Miller and his wife say in their testimony as well as in their answer, that the bond and mortgage were to be used as security to raise the money, if necessary. It appears, in fact, to have been necessary. And when they had been used for the purpose by assigning them to the complainant, the title of the complainant to them could not be affected by any agreement between the Millers and Ferdon as to the payment thereof out of the profits, of which he had no notice when he took his assignment. The complainant is no relation or connection of Ferdon. There is nothing in the evidence to induce doubt as to his *bona fides* in the transaction, or as to his candor in his testimony, and he is corroborated by John Ferdon. The Millers confided the bond and mortgage to Ferdon in order that he might negotiate them, and to that end and that he might appear to be the true owner of them, made them in his favor. They contained no evidence of any trust or confidence, but purported to be securities for an existing debt, with careful provision to secure the prompt payment of interest on the one hand, and the privilege of payment of the principal by installments on the other. There was no indication or intimation that they were not in all respects what they purported to be. If there had been, it would have been fatal to their negotiability. The complainant is entitled to a decree.

Vliet v. Young.

MARTHA J. VLIET and her husband

v.

ADAM YOUNG.

A deed of lands, accompanied by a lease thereof to the grantor, containing a clause for redeeming the lands, by paying a certain amount within a specified time, is a mortgage, and not defeated by the grantor's failure to make a tender within the time limited, although the grantee took possession of the premises at the expiration of the lease. The time for making such tender may be extended by parol.

Bill for relief. On final hearing on pleadings and proofs.

Mr. R. V. Lindabury, for complainants.

Mr. W. W. Anderson, for defendant.

THE CHANCELLOR.

The complainants, on the 5th of July, 1869, executed a deed conveying to the defendant in fee a lot of land of about ten acres, in Somerset county, belonging to Mrs. Vliet. The consideration expressed is \$400. It is stated in the deed that the conveyance is made subject to a mortgage of \$400, held by Rachel C. Amerman. It was in fact held by the administrator of her estate. Contemporaneously with the giving of the deed, a lease of the premises was given by Young to Mrs. Vliet and her husband, for a term extending from that time to the 1st of April then next (1880), at a rent of \$24 a year, payable quarterly, with provision that in case of default for five days in the payment of the rent, the Vliets would give up possession to Young. The lease contained, also, an agreement that the Vliets should have the opportunity and privilege of redeeming the property by paying, or causing to be paid, to Young, his heirs or assigns, the sum of \$400, on or before the 1st of April, 1880; and they

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on their part, agreed that in default of paying that money on or before that day they would give up possession to him, his heirs or assigns. The complainants did not pay the money, or any part of it, within the time fixed by the agreement. Mrs. Vliet, however, on the 22d of May, 1880, tendered to Young the \$400, and \$18 as the rent due up to the 1st of April, 1880. Young took possession of the property April 2d, 1880, by pasturing his sheep thereon. Therefore, no rent had accrued from the first of that month. When Mrs. Vliet tendered him the money, he took the \$18 for the rent, but refused the \$400. The bill was filed on the 25th of June. It prays that the deed, which the complainants say they did not, when they signed, understand to be what it purports to be, may be annulled, or that it may be decreed to be a mortgage, and that they may be permitted to redeem by paying the \$400, and interest thereon from the 1st of April, 1880, provided Young shall pay off the Amerman mortgage, he to come to an account with them for the use of the property since he has been in possession; or if the deed and lease together shall be construed to be a conveyance, with agreement for reconveyance, that Young may be decreed to specifically perform his agreement to reconvey on payment of the \$400. Young, by his answer, alleges that the deed was understood by the complainants when they executed it; that when the tender was made the time for redemption had passed, and had not been extended; that the tender was not absolute, and that if it was he was not and is not bound to convey. He admits that the Amerman mortgage is held by one William Hillard, by assignment from Amerman's administrator.

The history of the transaction preceding the execution of the deed and lease appears to be as follows: Young (who was then the owner of the property), in 1869, conveyed it to Mrs. Vliet. It was subject to the \$400 mortgage, which was given by him to secure his bond. In 1879, the holder of that mortgage, Rachel Amerman's administrator, pressed the Vliets for payment of the money due upon it. They were unable to respond, and he threatened foreclosure. Young heard of it, and being, as he says, anxious, in view of his liability on the bond, to

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avoid the expense of foreclosure proceedings, offered to help them in the matter, proposing to pay off the mortgage, or to get Hillard to take an assignment of it, and so give them time to raise the money. They accepted his offer, and left it to him to make the necessary arrangements for his security and their protection. He asked for the deed which he had given Mrs. Vliet for the property, and it was delivered to him. He gave instructions to the scrivener whom he employed as to the instruments of writing to be drawn, and on the 5th of July, 1879, he and they met at the scrivener's office to execute the papers, and the deed and lease were then produced and signed. Young paid no consideration for the deed, and did not agree to pay any. He did not pay off the mortgage, but got Hillard to pay it and take an assignment from the holder. He has never expended anything upon the property. He did not get the deed recorded until after the tender. The property is not improved with any buildings. By the deed to him, the conveyance is declared to be for the consideration of \$400, and also to be subject to the mortgage. By the lease, the privilege of redemption by paying the mortgage is given to the Vliets.

Young evidently contemplated raising the money for the mortgage, and wanted the property for security, and he was willing, if the Vliets would convey the property to him, to raise the money and give them time to obtain it, as, it proved in the sequel, they were able to do. Hence he adopted the plan of a deed to him, and a lease, to secure the interest of the \$400, by way of rent, with an agreement of defeasance. The Vliets insist that they did not understand that they were to convey the property to Young. But whether they did so or not is quite immaterial, for if the transaction was such as I have stated, the deed must be held, in equity, to be a mere mortgage. And whenever it can be clearly shown to be the intention of the parties that real estate, when conveyed, shall be subject to redemption, it is considered as a mere security, and the right of redemption cannot be confined to a limited time. *Youle v. Richards*, *Sutl.* 534; *Crane v. Bonnell*, 1 Gr. Ch. 264. But, further, according to the clear weight of the evidence, Young expressly

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agreed to extend the time for redemption to the 1st of July, and the tender was made in May. Vliet testifies that on the 1st of April he went to see Young, and told him that he and his wife had the promise of the money (as indeed they had), and requested him to give them three or four weeks further time, and he says that Young, in reply, said that at any time between that day and the 1st of July "that Vliet got the money he would give up the property." Mrs. Vliet swears that at the time of the tender, on Young's refusal to take the money, she asked him whether he did not make that promise to her husband, and he replied that he did, but added that he was not going to do so until he got his sheep off the land and the crops gathered. Mr. Hoffman, who was present, corroborates her statement. William P. Sutphen, who was also there, says that Young told him, in that interview, that there was an agreement, and it had been extended to the 1st of July. He says he thinks it was on some conditions, and that Young said that now he could not take the money or give up the property, and that the money was not coming to him anyway, but would have to go to Mr. Hillard; and he further says that the reason Young gave why he did not give up the property was that he had purchased some sheep and was pasturing them there.

To the testimony of Mrs. Vliet, and Hoffman and Sutphen, on the subject of his admission that he had extended the time, there is opposed only Young's denial. The tender appears to have been wholly unconditional, and it is clear that Young refused it solely on the ground that Mrs. Vliet had lost her right to redeem. The complainants, in their bill, tender themselves ready to pay off the mortgage on receiving a reconveyance of the property, and that is in accordance with their understanding of the agreement, for Mrs. Vliet, in her testimony, says that she understood that after the making of the lease she and her husband were to have the property as they had had it before, and were to pay the interest on the \$400 which Young had borrowed for them, and she adds that Young told her that he had borrowed \$400 of Mr. Hillard, which he, Young, was to let her have. They are entitled to redeem on paying the amount due

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on the mortgage, and Young will be required to reconvey accordingly to Mrs. Vliet on those terms, and to come to an account with her for the rents, issues and profits. In the accounts he will be allowed for interest and taxes, if any paid. He will be required to pay costs.

HENRY LUERS et al., administrators,

v.

PETER BRUNJES et ux.

Moneys given by a married woman to her husband in 1855, and for which she received no evidence or security until 1877, when he had become insolvent—*Held*, not to sustain, under the circumstances, as against his existing creditors, a transfer of property to her in 1877, but as to them to be fraudulent.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. *C. L. Corbin*, for complainants.

Mr. *John Linn*, for defendants.

THE CHANCELLOR.

On the 1st of May, 1875, Henry J. Ockershausen and Peter Brunjes gave to the executors of Henry Luers, deceased, a bond conditioned for the payment by them of \$38,000, with interest. They also gave a mortgage of real estate to secure the payment of the bond. The mortgage was foreclosed by the complainants, who are administrators with the will annexed of Henry Luers, and under the foreclosure the mortgaged premises were sold in 1879. There was a deficiency. March 18th, 1879, a judgment was entered in the supreme court of New York against Ocker-

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shausen and Brunjes in favor of the complainants for \$33,015.86 of the bond debt, and on the 19th of August, 1879, the complainants recovered judgment thereon in the supreme court of this state for \$33,605.87. Subsequently, execution against goods and lands was issued on this latter judgment and returned wholly unsatisfied. The object of this bill is to compel the application to the payment of the last-mentioned judgment of a mortgage for \$11,500 upon the stock and fixtures of a brewery, given to and held by Mrs. Brunjes. The mortgage was given to her for a debt due her husband, and for which, with debts due others, a previous chattel mortgage for \$30,000 was given to him in 1876. The personal, individual interest of Brunjes in that mortgage of \$30,000 was to the amount of \$11,500. After that mortgage was given to him he assigned that interest to his wife, and in 1878 a separate mortgage was given to her for it. In 1879 another mortgage was given to her instead of the last-named mortgage. As will have been seen, the complainants' debt was contracted in or about 1865. It was part of the consideration which Ockershausen and Brunjes agreed to pay for the interest of Luers in the property of the firm of Brunjes, Ockershausen & Co., of which Luers was a member. He died in or about the year 1865. The complainants insist that the transfer by Brunjes to his wife of the debt of \$11,500 due him, was fraudulent as to those of his creditors whose debts then existed. The only evidence on the subject of the consideration of the transfer, is the testimony of Brunjes and his wife. It appears from that, that the consideration was money belonging to Mrs. Brunjes, which, after their marriage, he received and applied to his own use. They were married in 1853. She had at that time a house and lot in the city of New York, two notes, one for \$2,500, made by her husband's brother, and the other for \$800, made by John Hemken, and she had \$1,200 in money. She says she lent the \$1,200 to her husband very soon after their marriage; that she does not know what he borrowed that money for, nor what he did with it, but guesses he put it in his business; that the two notes were paid to her husband with her consent, and that they were so paid not long after the marriage—

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within about a year, she thinks; that the house and lot were sold 1855 or 1856, for \$4,000 or \$5,000 above the amount of a mortgage for \$3,000, which after her marriage she had put upon them; that the money for the mortgage and the money for the property were paid to her husband with her consent, and that she does not know what he did with those moneys. They both speak of the money he received from her as having been lent to him. She, however, never received any security for or acknowledgment of any kind from him for it up to the time of the transfer in 1877, a period of about twenty-two years. He never paid or gave to her anything on account of it; never paid her any interest for it, and never gave her any evidence of the alleged indebtedness, and she never asked for any. He says the money was lent to him "right after they were married;" that she gave him the control of it; that she gave it to him; that he put the avails of the mortgage, \$3,000, in the grocery business, and put the proceeds of the sale of the property in the sugar business; that between the time when he received the \$3,000 and the time when he received the proceeds of the sale, he gave up the grocery business and went into the sugar business, and that he then thought himself a prosperous man. It is quite clear, from their statements, that the money was not lent by the wife to the husband, but that he received it with her full consent, and, with like consent, applied it to his own purposes. He does not appear to have ever promised to repay it, nor does it appear that she ever expected him to repay it, but the contrary. He appears to have passed over to his wife all of his property which was of any value. The transfer evidently was not *bona fide*, and it is not valid as against the complainants' debt. There will be a decree accordingly.

The case is within the principles of the following cases: *Benson v. Eveland*, 11 C. E. Gr. 468; *Post v. Stiger*, 2 Stew. Eq. 554; *Clark v. Rosenkrans*, 4 Stew. Eq. 665; *Miller v. Sauerbier*, 3 Stew. Eq. 71; *Sayre v. Fredericks*, 1 C. E. Gr. 205; *Edelen v. Edelen*, 11 Md. 420; *Kuhn v. Stansfield*, 28 Md. 210; *Humes v. Scruggs*, 4 Otto 22. See, also, 1 Bish. M. W. § 123.

Collier v. Pfenning.

MICHAEL COLLIER

v.

CHARLES PFENNING et ux.

In 1860, complainant made a verbal agreement with his brother John to buy a part of a tract of land on which John then lived. He paid the purchase-money, entered into possession, and erected thereon a dwelling-house, in which he has ever since resided. John continued to live on the other part of the land. In 1873, John gave three mortgages covering the entire tract. In 1877, the first mortgage was foreclosed, and the whole tract bought thereunder by the holder of the other two mortgages. In 1875, complainant had a survey of his part of the tract made, and also a search of the records, whereby he discovered the existence of the mortgages; he also knew of the subsequent advertisement of the premises for sale under the foreclosure, and consulted counsel in regard to it, but took no steps to protect his claim, not even giving notice of it at the sheriff's sale.—*Held*, that his silence estopped him from setting up any claim to relief against the purchaser at the foreclosure sale.

Bill for specific performance. On final hearing on pleadings and proofs, and briefs of counsel.

Mr. A. T. McGill, for complainant.

Mr. John Linn, for defendants.

• THE CHANCELLOR.

The bill is filed to compel specific performance by the defendants, of a parol agreement, made by John Collier with the complainant, his brother, in 1860, for the sale of a lot of land containing an acre and a half. The defendant Charles Pfenning purchased the land in question at sheriff's sale, March 7th, 1877. It appears by the bill that in September, 1860, the complainant made a verbal agreement with his brother John, to buy of the latter, for the consideration of \$400, the land in question, which was part of a lot of six acres then owned by John; that he paid

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the purchase-money, entered at once into the possession of the land and improved it, building upon it a small dwelling-house, in which he has ever since resided. John lived upon the other part of the property. The complainant alleges that he never received any deed for the property. In 1873, John borrowed from Andrew Hoffman \$3,000 on a mortgage of the whole property, and of Paul Heerbrant, on like mortgages, two sums of \$1,000 and \$500. The Heerbrant mortgages were in the same year assigned to the defendant Pfenning for the full amount due thereon. Subsequently, and about the year 1877, Hoffman brought a suit in this court to foreclose his mortgage, making Pfenning, as the holder of the other two mortgages, a party thereto. The complainant Michael Collier was not a party, but his brother John was. That suit resulted in a decree for foreclosure and a sale of the premises under the execution issued, upon which Pfenning became, by purchase at the sheriff's sale, the owner of the property at the price of \$3,950. It appears by the evidence that in 1875 Michael first learned that his brother John had mortgaged the whole property by the mortgages before mentioned. He learned this through a search of the records which he then caused to be made by a surveyor, whom he employed to survey his property, and draw the deed therefor from John to him. It seems quite probable, from the testimony of Williams, the surveyor, that the deed was in fact drawn and executed at that time. The complainant rests his claim to relief in this suit, upon the principle that possession of land is notice to others of the possessor's title. But as was said in *Groton Savings Bank v. Batty*, 3 Stew. Eq. 126-131, that principle is intended for a shield to protect the equitable rights of those who are entitled to the consideration of equity. It will not be available as a cover for fraud, nor will it be applied against equity.

"It may reasonably be questioned," says the chief-justice, in *Lathrop v. Groton Bank*, 4 Stew. Eq. 273, "whether, in many cases, the rule that the possession of lands being in a stranger to the documentary and record title, makes it unsafe to trust to such title with implicitness, has not been pushed to an extreme, so as to produce inequitable results; and it certainly seems necessary, if the rule is to retain a leaven of justice, to annex to it the qualification that

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the occupier of the property should be required to refrain from doing any thing having an illusive tendency with respect to the ownership."

In that case the defence set up was, that although the absolute title to the mortgaged premises was vested in the mortgagors when the mortgages were given, and although such was the title as it appeared upon the record in the clerk's office, yet, notwithstanding that, the real owner in equity was the defendant Mrs. Lathrop, and as she was openly in the possession and enjoyment of the property, both when those encumbrances were executed and for a long time previously, the bank (the complainant) from that fact was put upon inquiry, and if it had discharged that duty, it would have discovered that its mortgagors were mere trustees, having no right to execute those instruments or either of them. The defendant Mrs. Lathrop was held to be estopped, by her silence and acquiescence, from invoking the aid of the before-mentioned principle. After the first mortgage on the property had been given, she became aware that it had been executed, and she did not, between that time and the time when the second one was given (which was to the same parties), notify the bank of the existence of her title. In the case in hand, it appears that the complainant knew of the existence of the decree for foreclosure and sale of the whole property for three or four months, at least, before the sale took place. He testifies that he knew that the property was advertised for sale by the sheriff, and that he consulted counsel in reference to the matter, about three or four months before the sale. He did not attend the sale, however, nor did he give any notice to Pfenning, nor to any one else interested in the sale, of his claim of title. He, indeed, swears that Pfenning told him, before the latter bought the property—and he thinks it was in 1876—that he held a mortgage or mortgages on the property. He narrates the circumstances as follows:

"He came up to me one Sunday in the winter-time; there was snow outdoors; he came in and spoke to me, and talked about his having a mortgage on the property; I told him I didn't know anything about it; I didn't give any mortgage on the property; then he went on and told me how he got it."

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He further says—

“I told him it was my property, and he knew it was my property, too.”

It appears conclusively from the testimony that this statement is entirely unworthy of credit, and that Pfenning never saw him until after the sale had taken place. Michael's son Andrew is the only other witness on the subject of notice to Pfenning, but it appears by his own testimony that he went to Pfenning for the purpose of endeavoring to purchase his mortgages from him at a low price. He not only did not inform Pfenning who he was, or of his relationship to the complainant, but, on the other hand, studiously concealed it, giving Pfenning to understand that he was a real estate dealer of the city of New York. Pfenning and two other witnesses, who were present at the conversation, all testify that nothing was said in it by Andrew, on the subject of the claim of ownership of the complainant to any part of the mortgaged premises; and Andrew's statement itself, in the light of his cross-examination, is unworthy of confidence. The complainant, then, with a full knowledge of his rights—for as before stated he had consulted counsel on the subject—permitted the sheriff's sale to take place, without notifying those who proposed to purchase the property at that sale, that he was the owner of any part of it. Under the circumstances, he must be held to be estopped by his silence, from setting up his claim to relief against the purchaser, who, it may be stated, was compelled to pay out of the purchase-money (\$3,900) the Hoffman mortgage of \$3,000, with interest and costs.

The bill will be dismissed, with costs.

Personette v. Pryme.

Mr. F. H. Pilch, for demurrant.

Mr. T. Anderson, for complainant.

THE CHANCELLOR.

The complainant's intestate, Dr. Stephen Personette, and the defendant, Anna L. Pryme, his niece, were the owners in equal shares in fee of a farm in Essex county. Their title was derived under the will of Joseph Personette, deceased, who thereby gave the property to his son Jephthah, who, after the death of the testator, died intestate, without issue, and unmarried, and on his death Dr. Personette, his only brother, and Miss Pryme, the only child of his only sister (who was then dead), inherited the property. By the will, the testator directed his executors to furnish his widow with everything necessary for her comfort during her natural life, and provided that, in case they should refuse or neglect to do so, she should "have the privilege to choose a person to act for her." Dr. Personette and Miss Pryme agreed with each other, after they became the owners of the farm, that the property should, during the joint lives of them and the widow, be considered and conducted by them as partnership property, bound for the support of the widow during her life;

derson v. Hudson, 1 Munf. 510; *Parker v. Bodley*, 4 Bibb 102; *Thorn v. Thorn*, 11 Iowa 146; *Clancy v. Craine*, 2 Dev. Eq. 363; *Wetherbee v. Potter*, 99 Mass. 354; or to locate mines, *Murley v. Ennis*, 2 Col. 300; or to survey and take up public lands, *Gibbons v. Bell*, 45 Tex. 417; see *Henley v. Brown*, 1 Stev. 144; *Bryant v. Hendricks*, 5 Iowa 256; *Davis v. Walker*, 4 Hayw. 295; nor one to remove a mortgage from lands, or to cancel it, *Green v. Randall*, 51 Vt. 67; *Wallis v. Long*, 16 Ala. 738; *Howard v. Gresham*, 27 Ga. 347; *Valle v. American Co.*, 27 Mo. 459; *Ackla v. Ackla*, 6 Pa. St. 228; *Holland v. Johnson*, 51 Ind. 346; *Simonton v. Gaudolfo*, 2 Fla. 392. (CONTRA: *Duncan v. Blair*, 5 Denio 196; *Dock v. Hart*, 7 W. & S. 172; *Parker v. Barker*, 2 Metc. (Mass.) 423; *Leavitt v. Pratt*, 53 Me. 147; *Phillips v. Leavitt*, 54 Me. 405; *Malins v. Brown*, 4 N. Y. 403; see, also, *Toppin v. Lomas*, 16 C. B. 145; *Massey v. Johnson*, 1 Exch. 241; nor a contract to keep up a fence, *Fleming v. Ramsey*, 46 Pa. St. 253; see *Yeakle v. Jacob*, 33 Pa. St. 376; *May v. Baskin*, 12 Sm. & M. 428; nor one not to use a building in trade competition, *Leinan v. Smart*, 11 Humph. 308; *Bostwick v. Leach*, 3 Day 476; see *Gottschalk v. Witter*, 25 Ohio St. 76; also, *Richardson v. Pierce*, 7 R. I. 330; nor one to build a party-wall, *Hayes v. Moynihan*, 60 Ill. 409; see *Stuart v.*

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that during the joint lives of the three they two should contribute equally, as owners of the farm, to the support of the widow and to the expense of managing the farm and the payment of the taxes thereon, and that an account should be kept of the proceeds of the sale of the produce and of the sale of any sand which might be sold from the property, and of the money required to be paid for the comfortable support of the widow by either of the partners. And it was at the same time also agreed between them that inasmuch as Miss Pryme had no income, nor any means of support except from her share of the produce of the farm, Dr. Personette should, from time to time, advance money to her as she might need it, and pay such debts as she might contract for necessary services to herself individually; and that such payments should be charged against her and credited to him in the partnership accounts, and that in those accounts she should account to him therefor; and that on the death of any one of the three there should be an account. The agreement subsisted until the death of Dr. Personette. Under it, and in accordance with its provisions, he (Miss Pryme all the time actually residing on the farm, and he in the near neighborhood) furnished a comfortable support to the widow, advanced money to Miss Pryme and paid money for her; paid the taxes on the property, and

Smith, 7 Taunt. 158; *Rice v. Roberts*, 24 Wis. 461; nor one to pay taxes on lands, *Brackett v. Evans*, 1 Cush. 79; nor one to pay an assessment, *Remington v. Palmer*, 62 N. Y. 31; *Carr v. Dooley*, 119 Mass. 294; *McCormick v. Cheevers*, 124 Mass. 262; nor one to drain a mine, *Townsend v. Peasley*, 35 Wis. 383; nor one to divert a water-course, *Hamilton Co. v. Cincinnati R. R.*, 29 Ohio St. 341; *Le Fevre v. Le Fevre*, 4 Serg. & Rawle 241; nor one to build a ditch and keep it in repair, *Gooch v. Sullivan*, 13 Nev. 78; nor one to build a dam, *Jackson v. Litch*, 62 Pa. St. 451; see *Stevens v. Stevens*, 11 Mete. 251; *Pitman v. Poor*, 33 Me. 237; nor one to set out fruit trees, and receive a share of their product as compensation, *Wiley v. Bradley*, 60 Ind. 62; see *Falmouth v. Thomas*, 1 Cr. & Mee. 89; *Cain v. McGuire*, 13 B. Mon. 340; nor an agreement for board and lodging at so much per year, with the owner of the premises, *Wright v. Stavert*, 2 Ell. & Ell. 720; *Wilson v. Martin*, 1 Denio 602; see *Inman v. Stamp*, 1 Stark. 12; nor one for "mutually keeping house," *Austin v. Thomson*, 45 N. H. 113; nor one to destroy the rabbits on demised lands, *Morgan v. Griffith*, L. R. (6 Exch.) 70; nor one to remove a prior lease on lands conveyed, *Negley v. Jeffers*, 28 Ohio St. 90; nor one to answer for damages done by defendant's workmen in quarrying stone on plaintiff's land,

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exercised superintendence over the management of it in conjunction with her, consulting her as part owner and partner in the general conduct of the business, and the sale of the produce and sand. The bill is filed by the administratrix for an account. It asks an answer without oath.

The defendant demurs on the ground of want of equity; that the complainant sues in a representative capacity, and yet prays a discovery from the defendant as to transactions with and statements by the intestate; that the agreement set forth in the bill is void by the statute of frauds and perjuries, and that the complainant had an adequate remedy at law.

The bill is based on the allegation that a partnership existed between Dr. Personette and Miss Pryme in the management and proceeds of the farm. Such a partnership could have existed (3 *Kent's Com.* § 28), and the agreement for it, if by parol, is not within the statute of frauds and perjuries. The objection to the bill based on the statute concerning evidence is not valid. The complainant is not, by the fact that she sues in a representative capacity, debarred from requiring the defendants to testify in reference to the subject matter of the controversy. *Daw v. Vreeland*, 3 *Stew. Eq.* 542. As to the remaining objection that there is an adequate remedy at law, the bill indeed states that

Griffiths v. Jenkins, 10 *Jur. (N. S.)* 207; nor one to pay a grantor the excess beyond the original purchase-money, on a resale, *Graves v. Graves*, 45 *N. H.* 323; *Bruce v. Hastings*, 41 *Vt.* 380; nor one to remove buildings from lands conveyed by the defendant, *Detroit R. R. v. Forbes*, 30 *Mich.* 165.

A landlord's parol contract to make repairs on the demised premises is within the statute, *McMullen v. Riley*, 6 *Gray* 500; *O'Leary v. De Laney*, 63 *Me.* 584; *Wood's Land. & Ten.* § 377; *Addison on Cont.* § 203; *Lewis v. Seabury*, 74 *N. Y.* 409; and the right to use a church for public worship when not occupied by the congregation to which it belongs, *Brumfield v. Carson*, 33 *Ind.* 94; and holding the title of lands to indemnify a surety for work and labor to be done by the covenantee, *Harper v. Spainhour*, 64 *N. C.* 629; see *Dyer v. Graves*, 37 *Vt.* 369; and building a saw-mill on the lands of another, who agrees to furnish from his lands the logs to be used at the mill, *Jones v. McMichael*, 12 *Rich.* 176; and the sale of a pew, *Vielie v. Osgood*, 8 *Barb.* 130; *Buck v. Pickwell*, 27 *Vt.* 157.

For cases of parol partnership in the management of lands and the products thereof, see *Crawshay v. Maule*, 1 *Swanst.* 495; *Morris v. Barrett*, 3 *Y. & J.* 384; *Roberts v. Eberhardt*, *Kay* 148; *Howe v. Howe*, 39 *Mass.* 71.—REF.

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since the death of Dr. Personette his account (which, it alleges, is a true one) of the advances and payments made by him under the agreement, was exhibited to Miss Pryme, and that she admitted its correctness, but manifestly that fact does not prevent the complainant from having recourse to equity. The account sought for can only be had in this court. The demurrer will be overruled.

GILBERT DONIOL

v.

THE COMMERCIAL FIRE INSURANCE COMPANY OF THE CITY
OF NEW YORK.

A policy of insurance was issued to and in the name of the complainant's wife, on his property, upon her application. Complainant alleged that the policy was taken out by her in her own name instead of his, by mistake on her part. Reformation after loss refused, on the ground that there was no proof of mutual mistake, nor of fraud on the part of the company.

Bill to reform policy of insurance. On final hearing on pleadings and proofs.

Mr. W. P. Douglass, for complainant.

Mr. R. E. Chetwood and *Mr. Coursen*, of New York, for defendants.

THE CHANCELLOR.

The object of this suit is to reform a policy of insurance against loss or damage by fire, issued by the defendant in favor of the complainant's wife, on her application, on the 4th of March, 1875. The complainant alleges that the policy was in fact taken out for him, and that his wife's name was inserted

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therein instead of his own, through mistake. The proof is, that when it was taken out there was already a policy for \$3,000 on the property (which was a dwelling-house, and the furniture therein, in Carrieville, in Bergen county), issued by the Williamsburgh City Fire Insurance Company, December 24th, 1874, to the complainant, in his own name. Shortly before the application to the defendant was made, the complainant's wife took out a policy from the State Insurance Company, in her own name, for the like amount—\$3,000—on the same property, and the policy issued by the defendant was also for the same sum and on the same property. The property was destroyed by fire in nine days after these two last-named policies were taken out. The application which resulted in the issuing of the policy by the defendant, was made to Reinhold Bœklen, jun., an insurance agent in New York, but inasmuch as the company of which he was agent, (the Hanover Insurance Company,) declined all risk where the property was not in the city of New York, he, at Mrs. Doniol's request, undertook to obtain the insurance for her from another company. She requested that the policy should be issued in her name, and he made application for her accordingly. There is no evidence whatever of any mutual mistake on the part of the parties to this suit in the issuing of the policy, or of any fraud on the part of the defendant. The latter issued the policy in accordance with the application. The Williamsburgh policy was indeed delivered to it, but it was so delivered merely to give the description of the property, and when it was delivered there was attached to it a piece of paper on which Mrs. Doniol's name was written. It is argued, and the complainant's case rests on that claim, that the defendant had notice by the Williamsburgh policy that the property was the complainant's, and not his wife's. But the application was for a policy in the name of Mrs. Doniol, and she represented that she was the owner of the property. The defendant was, of course, right in issuing the policy to her accordingly.

The bill will be dismissed, with costs.

Reece v. Reece.

MARY ANN REECE

v.

JOHN REECE.

Where a husband and wife have never lived together, and the wife evinces a strong disinclination to live with her husband at all, and repulses his advances towards a reconciliation, their consequent separation held not to be desertion within the divorce act.

Petition for divorce. On final hearing on pleadings and proofs.

Mr. M. Force, for petitioner.

Mr. W. Prall, for defendant.

THE CHANCELLOR.

This suit is brought for a divorce, on the ground of desertion. The parties were married in 1873. They have one child, born in the following year. Ever since the marriage (which took place in Paterson) the petitioner has resided in that city, at the house of her parents. With the exception of about nine months, from the early part of the summer of 1875 to the spring of 1876, during which time he was absent in Rhode Island (where, being out of work, he went at his wife's instance to obtain work at his trade, that of a carpenter, with a relative of hers), the defendant has also resided in Paterson. When he returned from Rhode Island, he first went to the house of his wife's grandmother. He unexpectedly met his wife there. She appears to have received him with coldness, if not with evidence of positive dislike. During his absence she declared that she had lost her affection for him. The reason why does not appear. The evidence on the subject is exceedingly meagre. From

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her grandmother's house he went, the same day, to her father's, where the child was. He arrived there first. When the petitioner came in neither spoke to the other, and they do not appear to have spoken to each other while he was there. From that time they lived separate in the same city, Paterson, he with his mother, and she with her parents. She earned her living by working in a mill, and her parents supported the child, which was living with her. He appears, however, to have contributed to clothing it. He swears that his only reason for not living with his wife was that he had heard that she had said she would never live with him; and he further says that he would have supported her if she had applied to him to do so. It is clear, from the evidence, that the petitioner, when her husband returned from Rhode Island, not only received him with great coldness, but evinced a strong determination not to have any communication whatever with him. She offensively repulsed his advances to her, even on one evening when he called at his sister's, and found her there, refusing to permit him to accompany her home, although the weather was stormy. The evidence does not show the facts necessary to warrant a decree for divorce. The petition will, therefore, be dismissed.

ENOCH B. WOODRUFF, administrator,

v.

HENRY MUTSCHLER et al.

A mortgagee died in 1877, leaving, besides the mortgage, but little personal property, which was shortly afterwards divided among her next of kin. In September, 1879, the mortgaged premises were sold by their owner, and the amount of the mortgage paid to the mortgagee's next of kin, one of whom then produced the mortgage, and it was canceled of record. In October, 1879, one of the mortgagee's creditors, took out letters of administration on

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her estate.—*Held*, that the payment of the money due on the mortgage to the next of kin, and its cancellation of record, were invalid, and the latter was set aside on the administrator's application.

Bill for relief. On final hearing on pleadings and proofs.

Mr. C. F. Hill, for complainant.

Mr. C. Lentz, for defendants.

NOTE.—On the death of a mortgagee, the mortgage passes to his personal representative, who, in equity, is trustee of the heir, for whom he holds it, subject to the rights of creditors, *Burton v. Hintrager*, 18 Iowa 348; *Chase v. Lockerman*, 11 Gill & Johns. 185; *Barnes v. Lee*, 1 Bibb 528; *Kinna v. Smith*, 2 Gr. Ch. 14; *Ketchum v. Dew*, 7 Coldw. 532; see *Schoole v. Sall*, 1 Sch. & L. 176; *Aubrey v. Milton*, 2 Moll. 529; *Mutual Life Ins. Co. v. Sturges*, 5 Stew. Eq. 678, 6 Id. 328.

Although the mortgagee may have entered for condition broken, but died before foreclosure, *Fay v. Cheney*, 14 Pick. 399; *White v. Rittenmeyer*, 30 Iowa 268.

An executor may execute a power of sale contained in a mortgage of lands to his testator, *Richmond v. Hughes*, 9 R. I. 228; or an administrator, *Merlin v. Lewis*, 90 Ill. 505; *Harnickell v. Orndorff*, 35 Md. 341.

He may require the tenant in possession to attorn to him, where the mortgagee died after foreclosure, but before the time for redemption had elapsed, *Lockwood v. Tracy*, 46 Conn. 447; or, consent to the entry of another into the possession of the premises mortgaged, *Webster v. Calden*, 56 Me. 204. Or, sustain trespass against the heir for entering and cutting and carrying away wood, after foreclosure, *Palmer v. Stevens*, 11 Cush. 147; *Brooks v. Goss*, 61 Me. 307; or, the purchaser of the wood from the mortgagor in possession after condition broken, *McKellop v. Jackman*, 50 Vt. 57; nor can a quit-claim deed of the heir before foreclosure sustain a writ of entry by his grantee, *Taft v. Stevens*, 3 Gray 504; *Douglass v. Dunn*, 51 Me. 121; nor can the heir himself enter, *Smith v. Dyer*, 16 Mass. 18; *Haskins v. Hawkes*, 108 Mass. 379. See *Van Duyne v. Thayer*, 14 Wend. 233.

One of several executors can release a portion of the mortgaged premises, *Stuyvesant v. Hull*, 2 Barb. Ch. 151.

He may receive payment of the mortgage, and cancel it, *Ely v. Schofield*, 35 Barb. 330; *Schwartz v. Leist*, 13 Ohio St. 425; *Griffin v. Lovell*, 42 Miss. 402; see *Page v. Johnston*, 23 Wis. 295; although a foreign representative, *Doolittle v. Lewis*, 7 Johns. Ch. 45; see *Stone v. Scripture*, 4 Lans. 186; *Vroom v. Van Horne*, 10 Paige 549; *Thorpe's Case*, 15 Grant's Ch. 76.

If the mortgagor is the executor of the mortgagee, and charges himself with the amount of the mortgage debt as assets, this operates as a satisfaction,

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THE CHANCELLOR.

The bill is filed to annul the cancellation of a mortgage on land in Newark, and to re-instate and foreclose the mortgage. The case, briefly stated, is this: The defendant, Henry Osborn, being then the owner of the mortgaged premises, gave the mortgage to Margaretha Mack on the 29th of October, 1869. At the death of the mortgagee the mortgage was a valid, subsisting security, and there were due on it \$1,100 of principal, besides \$72.50, or thereabouts, of interest. After her death,

Martin v. Smith, 124 Mass. 111. See *Griffin v. Pringle*, 56 Ala. 486; *Wathen v. Glass*, 54 Miss. 382; *Thorp v. Feltz*, 6 B. Mon. 15; *McPhadden v. Bacon*, 13 Grant's Ch. 591; *Morrow v. Peyton*, 8 Leigh 54.

As to a fraudulent entry of satisfaction, and its effect, see *Fine v. King*, 6 Stev. Eq. 108; *Hays v. O'Connor*, 1 N. Y. Leg. Obs. 405; *Remann v. Buckmaster*, 85 Ill. 403; *Weir v. Mosher*, 19 Wis. 311.

If money due on a mortgage be paid to the heir, the executor may recover it from him, *Tabor v. Tabor*, 3 Swanst. 635.

Payment to the next of kin is no defence to an action by the administrator, *Mitchell v. Moorman*, 1 Y. & J. 21. See *Story v. Kemp*, 51 Ga. 399.

If money be decreed to be paid to B's distributees, payment to B's administrator is not a satisfaction, *Hamer v. Bethea*, 11 S. C. (N. S.) 416.

As to payments to one of several executors, see *Ewart v. Dryden*, 13 Grant's Ch. 50; *Ewart v. Snyder*, Id. 55.

One of two executors may consent to the postponement of the lien of their testator's mortgage, *Mutual Life Ins. Co. v. Sturges*, 6 Stew. Eq. 328, 335.

A personal representative may, before foreclosure, assign a mortgage belonging to his decedent's estate, *Burt v. Ricker*, 6 Allen 77; *Trades Saving Bank v. Freeze*, 11 C. E. Gr. 453; *Crooker v. Jewell*, 31 Me. 306; *Kinna v. Smith*, 2 Gr. Ch. 16; *Collamer v. Langdon*, 29 Vt. 32; see *Winslow v. Crowell*, 32 Wis. 633; *Sinclair v. Dewar*, 17 Grant's Ch. 621; *Renaud v. Conselyea*, 7 Abb. Pr. 105; *Ladd v. Wiggin*, 35 N. H. 421; and, *semble*, a foreign administrator may also, *Clark v. Blackington*, 110 Mass. 369; *Grace v. Hunt*, 1 Cooke 344; *Copper v. Wells*, Sax. 10; *Smith v. Tiffany*, 16 Hun 552; see *Seldon v. Sill*, 8 How. 441; *Thatcher v. Hatch*, 6 McLean 68; *Hill v. Winne*, 1 Biss. 275; *Cutter v. Davenport*, 1 Pick. 81; so where an assignment of a mortgage is made to an administrator, as such, *Flagg v. Johnston*, 33 Ga. 26; 2 Jones on Mort. § 1390; *Wilkins v. Sorrels*, 45 Ala. 272; *Thurston v. Kennett*, 23 N. H. 151; see *Richards v. Adamson*, 43 Iowa 248; *Bogert v. Hertell*, 4 Hill 492; *People v. Miner*, 37 Barb. 466.

One of several executors may so assign, *Jones on Mort.* § 796; see *Stuart v. Abbott*, 9 Gratt. 252; *Hitchcock v. Merrick*, 15 Wis. 522.

And such assignee may foreclose in his own name, *Nelson v. Stollenwerck*

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was a little household furniture, worth not more than \$50, which was soon after her death divided up among her children. She died in September, 1877. One of the creditors of the estate took out letters of administration upon it in October, 1879. That the cancellation was unauthorized, there is no room to doubt. The next of kin had no authority to discharge the mortgage debt. They had none to cancel the mortgage. *Wms. on Exrs.* 504; *Hatch v. Proctor*, 102 *Mass.* 351; *Foster v. Bates*, 12 *M. & W.* 226. Mutschler, by his answer, alleges that he bought the property free from the mortgage, and that when it was conveyed to him, the mortgage had been canceled. But he admits, in his testimony, that he knew that Mrs. Mack held the mortgage at her death, and it appears from his testimony that he knew that it was the money paid by him for the consideration of the conveyance which the next of kin received in consideration of the cancellation of the mortgage. He must be held to have known that the land was not freed from the mortgage by the cancellation. He was bound to see that the cancellation on which he relied was made by due authority. The cancellation will be annulled, and the mortgage re-instated, and there will be a decree for the foreclosure and sale of the premises.

ABRAHAM COLLERD

v.

ISAIAH A. HUSON et al.

Two purchase-money mortgages on the same premises were given and recorded simultaneously in September, 1859. One of them was payable in eight months, without interest, and was further secured by a surety on the bond. The other was payable in fifteen years, with interest. The surety paid his bond when it fell due, in May, 1860, but obtained no assignment of the mortgage until November, 1869, and did not record his assignment until November, 1875. The mortgagee assigned the other mortgage to B. in March,

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1868, and that assignment was recorded the same month.—*Held*, that the mortgages were concurrent liens; the fact that one became due before the other giving it no priority.

Bill to foreclose, and cross-bill. On final hearing on pleadings and proofs.

Mr. W. B. Williams, for Collerd.

Mr. G. Ackerson, jun., for Brinkerhoff.

• THE CHANCELLOR.

The controversy between the litigant parties is as to the priority of two mortgages given by Isaiah A. Huson to Isaac Goetschius, September 14th, 1859, on the same property, a farm in Bergen county, one for \$2,000, payable May 1st, 1860, without interest, and the other for \$4,500, payable in fifteen years from its date, with interest from the 1st day of May, 1860. These mortgages were given to secure part of the purchase-money of the mortgaged premises, which, at the date thereof, were conveyed by Goetschius to Huson. In the bond, the pay-

NOTE.—Mortgages on lands, given simultaneously, are concurrent liens, even when in the hands of different assignees, *Gausen v. Tomlinson*, 8 C. E. Gr. 405; *Vredenburg v. Burnet*, 4 Stew. Eq. 229, 7 Stew. Eq. —; *Naylor v. Throckmorton*, 7 Leigh 98; *Lane v. Nickerson*, 17 Hun 148; *Pomeroy v. Latting*, 15 Gray 435; see *Gilman v. Moody*, 43 N. H. 239; *Riddle v. George* (N. H.), 6 Reporter 757; *Greene v. Warnick*, 64 N. Y. 220; *White v. Leslie*, 54 How. Pr. 394; *Freeman v. Shroeder*, 43 Barb. 618; *Van Rensselaer v. Stafford*, Hopk. 569; and so of chattel mortgages, *Howard v. Chase*, 104 Mass. 249; *Welch v. Sackett*, 12 Wis. 243; *Aldrich v. Martin*, 4 R. I. 520.

But not where one is a purchase-money mortgage, *Boyd v. Mundorf*, 3 Stew. Eq. 545; *Turk v. Funk*, 68 Mo. 18; *Bolles v. Curli*, 12 Minn. 115; *Clark v. Brown*, 3 Allen 509; see *Cake's Appeal*, 23 Pa. St. 186; *Ogden v. Walters*, 18 Kan. 282; *Lovett v. Demarest*, 1 Hal. Ch. 113; *Short v. Buttle*, 52 Ala. 456.

In some states, where different debts, secured by the same mortgage, fall due at different times, they are to be paid according to their priority, 2 *Jones on Mort.* §§ 1699–1702; also *Kyle v. Thompson*, 11 Ohio St. 616; *Winters v. Franklin Bank*, 33 Ohio St. 250; *Huffard v. Gottberg*, 54 Mo. 271; *Peoples Sav. Bank v. Finney*, 63 Ind. 460; *Doss v. Dilmars*, 70 Ind. 451; *Walker v. Schreiber*, 47 Iowa 529; *Richardson v. McKim*, 20 Kan. 346; *McClintic v.*

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ment of which the \$2,000 mortgage was made to secure, Collerd was surety. To his signature he added the word "surety." He paid off the bond on the 5th of May, 1860, and subsequently (but not until November, 1869) obtained from Goetschius an assignment in writing of it for his own security. That assignment was not recorded until November 11th, 1875. On the 14th of March, 1868, Goetschius assigned the \$4,500 mortgage to Brinkerhoff for value. That assignment was recorded on the 17th of that month. Both mortgages were registered on the same day, and simultaneously. Collerd insists that his is entitled to priority over that of Brinkerhoff, and bases his claim on the allegation that it was understood when his mortgage was given that it was to be prior in lien to the other one, and he charges that Brinkerhoff took his assignment with notice of his right to priority. Collerd's claim to priority, as made by the pleadings, is denied by Brinkerhoff, and it is not maintained by the evidence. Collerd, on the one hand, swears that the understanding was, when the mortgages were given, that the \$2,000 mortgage was to be the first encumbrance on the property; but Goetschius, on the other hand, testifies directly to the contrary. Huson, the only other living witness of the transaction, says

Wise, 25 Gratt. 448; Marine Bank v. International Bank, 9 Wis. 57; Norris v. Beaty, 6 W. Va. 483; Belding v. Manly, 21 Vt. 550; Herrington v. McCollum, 73 Ill. 476.

But, in other states, the proceeds are divided *pro rata*, *Perry's Appeal, 22 Pa. St. 43; Lewis v. De Forest, 20 Conn. 427; Johnson v. Candage, 31 Me. 28; Carnahan v. Dyer, 2 Am. Law Reg. 121; Moore v. Ware, 38 Me. 496; Russell v. Carr, 38 Ga. 459; Davidson v. Allen, 36 Miss. 419; Ventress v. Creditors, 20 La. Ann. 359; Ellis v. Roscoe, 4 Baxter 418; Andrews v. Hobgood, 1 Lea 693; Smith v. Cunningham, 2 Tenn. Ch. 565; Eastman v. Foster, 3 Metc. 19; Paris Bank v. Beard, 49 Tex. 358; Delespine v. Campbell, 52 Tex. 4; Cooper v. Ulmann, Walk. Ch. 251; English v. Carney, 25 Mich. 178; Phillips v. Mariner, 5 Biss. 29.*

So where fractional parts of one debt are assigned, *Hancock's Appeal, 34 Pa. St. 155.*

The assignment of one note or bond carries with it a *pro rata* portion of the mortgage, *Stevenson v. Black, Sax. 338; Phelan v. Olney, 6 Cal. 478; Sample v. Roue, 24 Ind. 208; Swartz v. Leist, 13 Ohio St. 419; Anderson v. Baumgartner, 27 Mo. 80; Terry v. Woods, 6 Sm. & M. 139; Walker v. Schreiber, 47 Iowa 529; McLanahan v. Chambers, 1 Mon. 43; Stockton v. Johnson, 6 B. Mon. 408;*

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that he always supposed that the mortgage which became due first was first in order of priority, because it became due first; that he supposed the \$2,000 mortgage was the first; that his recollection is not clear as to what was said on the subject, but that was his impression on the subject. Goetschius appears to have had the same notion as Huson, that where two mortgages are given simultaneously on the same property, that which will become due first will therefore rank first, but thought it might be deprived of priority by recording it after the other. On the sale of the property by Goetschius to Huson, the former insisted upon receiving a cash payment of \$2,000. Huson could not make it. Goetschius agreed to accept instead thereof a bond for the \$2,000, payable in May following, provided Collard would become surety on it, which he did accordingly. Goetschius swears that he intended that the \$4,500 mortgage should be registered first, so that it would outrank the other mortgage, and that he gave such direction when he left the mortgage for registry. If he gave such direction, it appears to have been disregarded. As before stated, the proof does not establish Collard's claim of priority for the \$2,000 mortgage. Seeing that the mortgages were registered simultaneously, they are to be re-

Duncan v. Louisville, 13 Bush 378; *Woodruff v. King*, 47 Wis. 261; see *Stewart v. Crosby*, 50 Me. 130; *Page v. Pierre*, 26 N. H. 317; unless otherwise stipulated, *Grattan v. Wiggins*, 23 Cal. 16; *Beresford v. Ward*, 1 Disney 169; *Bank of England v. Turlerton*, 23 Miss. 173; *Noyes v. White*, 9 Kan. 640; *Bryant v. Damon*, 6 Gray 564; *Henderson v. Herrod*, 10 Sm. & M. 631; *Foley v. Rose*, 123 Mass. 557; *Langdon v. Keith*, 9 Vt. 209; *Ridston v. Brockway*, 23 Wis. 407.

In some instances the date of the assignment fixes the priority, irrespective of the date of the instrument, *Cullum v. Erwin*, 4 Ala. 452; *Bank of Mobile v. Planters Bank*, 9 Ala. 645; *Nelson v. Dunn*, 15 Ala. 501; *Griggaby v. Hair*, 25 Ala. 327; *Lyman v. Smith*, 21 Wis. 674.

A cancellation of record protects a bona fide purchaser of the premises against any unpaid notes in the hands of assignees, *Ayres v. Hays*, 60 Ind. 452; *Gregory v. Savage*, 32 Conn. 250.

A mortgage may be foreclosed for an overdue installment of the principal, *American Life Ins. Co. v. Ryerson*, 2 Hal. Ch. 9; *Adams v. Essex*, 1 Bibb 149; *Watkins v. Hackett*, 20 Minn. 106; *Sulmon v. Clagett*, 3 Bland 125; *Mussina v. Bartlett*, 8 Port 277; *Baker v. Lehman*, *Wright* 522; *King v. Longworth*, 7 Ohio 131; or for one of several notes, *Johnson v. Brown*, 31 N. H. 405; *Kennedy*

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garded as concurrent liens. Goetschius swears that Collerd applied to him previously to the time when the assignment to the latter was made, and requested him to make it, and he swears that he told Collerd that he was willing to do so, provided it would not affect his right to priority in respect to the \$4,500 mortgage, and that Collerd replied that the assignment would not affect that mortgage; that he did not want to hurt Goetschius, and that the property was worth the amount of both mortgages; but Collerd denies this wholly. Goetschius also swears that when he assigned the \$4,500 mortgage to Brinkerhoff, he had no idea that the \$2,000 mortgage was in existence, and Brinkerhoff testifies that Goetschius "gave him to understand," when he took the assignment of that mortgage, that it was the first and only encumbrance on the property, and he adds that if he had not believed that it was the only lien he would not have taken it. The weight of evidence is that when Collerd paid off the mortgage he took the bond into his possession, and directed the attorney in whose office the payment was made, and who was acting for Goetschius, to draw an assignment from Goetschius to him of the mortgage, and Goetschius then promised him that he would go to the lawyer's office

v. Hammond, 16 Mo. 341; *Tinsley v. Boykin*, 46 Tex. 592; *Pepper v. Dunlap*, 16 La. 163; *Gibbons v. Hoag*, 95 Ill. 45; see *Noyes v. Barnet*, 57 N. H. 605; and such proceeding will not bar a subsequent foreclosure for other installments, *Allen v. Wood*, 4 Stew. Eq. 103; *McDougal v. Downey*, 45 Cal. 165; *Skelton v. Ward*, 51 Ind. 46; *Smith v. Osborn*, 33 Mich. 410; *Magruder v. Eggleston*, 41 Miss. 284; *Darrow v. Scullin*, 19 Kan. 57; *Kemerer v. Bourne*, 53 Iowa 72; *McDougall v. Downey*, 45 Cal. 165; see *West's Appeal*, 88 Pa. St. 341; *Hubbard v. Jarrell*, 23 Md. 66; but see *Kimmell v. Willard*, 2 Doug. (Mich.) 217; *Cox v. Wheeler*, 7 Puig 248; *Buford v. Smith*, 7 Mo. 489; *Poweshick Co. v. Dennison*, 36 Iowa 244; *Robins v. Swain*, 68 Ill. 197; *Fowler v. Johnson* (Minn.), 9 Reporter 445; *Wilson v. Hayward*, 2 Fla. 27.

A payment of the installment terminates the suit, *Brown v. Thompson*, 29 Mich. 72; see *Dow v. Moor*, 59 Me. 118.

A mortgage may be foreclosed for interest before the principal is due, *Van Doren v. Dickerson*, 6 Stew. Eq. 388; *Valentine v. Van Wagner*, 37 Barb. 60; *Stafford v. Maus*, 38 Iowa 133; *Butler v. Blackman*, 45 Conn. 159; *Glass v. Warwick*, 40 Pa. St. 140; *Bank v. Johnson*, 53 Cal. 99; *Mahn v. Hussey*, 1 Stew. Eq. 546; *Booknan v. Burnett*, 49 Iowa 303; *Hunt v. Dohrs*, 39 Cal. 304.

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and sign it. He did not get the assignment, however, until 1869. And while it is true that when Brinkerhoff took his assignment Goetschius appeared of record to be the owner of the \$2,000 mortgage, yet that mortgage was uncanceled, and stood uncanceled of record. It was not produced by Goetschius to Brinkerhoff, nor its absence in any way accounted for. Col-lerd, as the surety in the bond, had a clear equity to the mortgage security for it, which Goetschius held. Brinkerhoff made no inquiry on the subject, but relied on what, as he says, Goetschius led "him to understand," which was that the \$4,500 mortgage was the first and only encumbrance; but he does not even remember that any reference was made to the \$2,000 mortgage. Col-lerd was then entitled to be subrogated to the rights of Goetschius under the last-mentioned mortgage, and he has not lost his right by any act or dereliction. There will be a decree that the mortgages are concurrent liens.

A. B.

v.

C. B.

1. In order to give jurisdiction, the divorce act requires that the parties, or one of them, must have been an inhabitant of this state at the time of the injury, desertion or neglect complained of, &c.—*Held*, that an incurable impotence existing at the time of the marriage, was a *continuing* injury and gave jurisdiction, although neither of the parties was an inhabitant of the state when the marriage was contracted.

2. The parties were married in 1865, and the defendant (the wife) successfully resisted all efforts for intercourse for about five years. Some time afterwards her impotence was discovered, and complainant induced her to submit to a surgical operation therefor, which was performed in 1877, but without success. In 1879 complainant became satisfied that defendant was incurably impotent, and in 1880 filed a bill for divorce on that ground.—*Held*, that his claim to relief had not been forfeited by delay.

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Bill for divorce on the ground of impotence.

THE CHANCELLOR.

Two objections to a decree for the complainant are presented for consideration. One is, that the facts show a want of jurisdiction, and the other, that if there be jurisdiction the complainant is barred of relief by his delay in bringing suit. The first objection is based on the provision of the statutory grant of jurisdiction. The act (*Rev. 314*) gives jurisdiction—

“Provided the parties or either of them were or shall be inhabitants of this state at the time of the injury, desertion or neglect complained of, or where the marriage shall have been solemnized or taken place within this state, and the complainant shall have been an actual resident in this state at the time of the injury, desertion or neglect complained of, and at the time of exhibiting the bill; or, where the adultery was committed in this state and the parties complainant and defendant, or either of them, reside in this state at the time of exhibiting the bill, or where the complainant or defendant shall be a resident of this state at the time of filing the bill of complaint, and the complainant or defendant shall have been a resident of this state for the term of three years during which such desertion shall have continued.”

The question is, whether, seeing that the impotence existed at the time of the marriage, that time must not be held to be “the time of the injury,” within the meaning of the above-quoted language of the first section of the statute. The parties were not, nor was either of them, inhabitants of this state then. The word “injury” in the language under consideration must be construed to mean ground of divorce when applied to cases where the complaint is of impotence, or that the defendant had a former husband or wife living when the marriage took place, or that the marriage was within the prohibited degrees. The injury from the incurable physical impotence of the defendant in this case has been a continuing one from the time of the marriage.

As to the other objection: The parties were married in 1865, and lived together till 1879. The evidence shows that the complainant was not aware for many years after the marriage that the defendant (his wife) was impotent. She for about five

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years successfully resisted his efforts for intercourse. When the fact of her impotence was discovered by him, he induced her to submit to a surgical operation to remove the difficulty. The operation was performed in 1877. It was not successful. The complainant became satisfied in 1879 that the defendant was incurably impotent. The bill was filed in 1880. There is no ground for the objection under consideration. The divorce will be decreed.

AMELIA L. GILMORE et al.

v.

GEORGE F. TUTTLE, trustee, et al.

The rate of interest to be computed on the accounting of a delinquent trustee, stated, where the rate had been changed by law during the period covered by the account; and also the proper method of calculating such interest where the trustee's disbursements had not been regularly credited to him; also other items of the account, as to the valuation of certain lands involved in his misfeasance, and the time from which he was chargeable with interest under the will, explained and settled.

Bill for relief. On exceptions by trustee to master's report.

Mr. J. W. Taylor, for the exceptions.

Mr. R. Wayne Parker, contra.

THE CHANCELLOR.

By the order made in this cause, May 29th, 1880, it was referred to the master to take, and state the accounts of the trustee, and it was ordered that in the accounts he ascertain and charge the trusts with the value of the lands sold and conveyed

TRUSTEES' DUTY.

to him by Amelia B. Gamore in 1872 and interest thereon, and he was bound to well use the property until Amelia L. Gamore, his daughter, came of age, the trust to terminate and the income for support of the children and for working capital was to be at any time available to the trustee, and that in no wise matter the sale of the estate. The trustee was required to lay out the trust in the purchase of stock in the bank. The first interest to the said children was with the trustee and charged in to the account of the trustee per cent per annum interest on. The trustee was charged with interest at the legal rate for the time being. There was no other interest for a number of years, and the rate of interest was during that time been charged by law, the rate of interest charged in the account of the trustee in the foreclosures of the first mortgage. *See Equity Master of Mary's* *Trust*, 10 Eq. 301. On the 4th of July, 1878, the legal rate of interest was charged from that date at six per cent per annum and was continued thereafter. The trustee under cover of the mortgage was paid.

The trustee was also to be bound to pay the master, in the first instance, the amount of the mortgage to sell and allow the trustee to do the same, the trustee to pay and eleven paid to the trustee in the first instance, the trustee to pay. An account of the trustee was made by the trustee, and the trustee was bound to pay the amount of the mortgage to sell and allow the trustee to do the same, the trustee to pay and eleven paid to the trustee in the first instance, the trustee to pay. This account was made by the trustee, and the trustee was bound to pay the amount of the mortgage to sell and allow the trustee to do the same, the trustee to pay and eleven paid to the trustee in the first instance, the trustee to pay. The trustee was bound to pay the amount of the mortgage to sell and allow the trustee to do the same, the trustee to pay and eleven paid to the trustee in the first instance, the trustee to pay.

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interest on his receipts. The method of making up the account adopted by the master is incorrect. To ascertain the amount of money for which the trustee is answerable, he debits the trustee with the amount with which he finds him justly chargeable as the proceeds of the sale of land to Mrs. A. B. Gilmore, made in May, 1871, deducts from it the cost of the homestead bought for Mrs. A. L. Gilmore, and the amount of a mortgage received as part of the consideration of that sale. On the balance he charges interest to the date of the master's account, and then charges the trustee with the proceeds of the other subsequent sales to Mrs. A. B. Gilmore, with interest thereon from the date thereof to the time of making up that account, and on the result of these charges he credits the trustee with only the amount of the excess of his payments over his receipts, according to the trustee's account, which, it should be stated, does not include the proceeds of the last-mentioned sales to Mrs. Amelia B. Gilmore. The trustee is thus charged with interest on all he received, except the cost of the homestead and the before-mentioned mortgage, and receives no interest on his over-payments.

Again, he charges the trustee with the whole of the fund of \$12,000, from September 2d, 1869, six months from the date of the declaration of trust, while by far the greater part of it, at least, was not raised until the sales to Mrs. A. B. Gilmore, which took place in May and August, 1871. In support of this charge, it is urged that it has been adjudged that the trustee ought to have raised the \$12,000 within six months from the date of the declaration of trust; but that is an error; it was not so adjudged. The trustee was, by the terms of the declaration, to raise that money by sale of the property only when it could be advantageously made, and it does not appear that it could have been so made before the sales to Mrs. A. B. Gilmore.

The account should be so stated as to show annual balances, and interest should be charged and allowed on such balances.

The fourth exception is in reference to the valuation fixed by the master on the land sold to Mrs. A. B. Gilmore. His valuation is clearly in accordance with the weight of the testimony. Those sales themselves, and the other sales, both pre-

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vious and subsequent, made by the trustee, are strongly confirmatory of the justice of the master's estimate.

The sixth exception is to that part of the report which is adverse to the claim of the trustee for allowance in respect to money paid to Langdon H. Gilmore.

By the order, the master was directed to ascertain to what time the complainant Mrs. A. L. Gilmore has received from the trust the allowance for support of her children. Her husband was bound to furnish the allowance, and in default thereof, it was to be paid out of the proceeds of sales of land remaining after the fund of \$12,000 had been raised. Mr. Gilmore appeared to have paid the allowance for a considerable period of time. So long as he paid it, the land chargeable with it in case of his default, was of course exempt. And the share of each of the children in that land was not chargeable with it after the child attained to majority. In this aspect it is important that the master should report as directed by the order. Langdon H. Gilmore, one of the children, received from the trustee, February 28th, 1874, \$3,784.42, on account of his share of the proceeds of the sale of that land. He was then past his majority.

The first, second, third, fifth and sixth exceptions are allowed, and the fourth is overruled. The report will be referred back to the master.

JULIA FOSTER

v.

THE UNION NATIONAL BANK OF RAHWAY et al.

After five mortgages had been given on a tract of land, a small strip thereof was condemned and taken for a railroad track, and the owner paid therefor. The fourth and fifth mortgages, held by the bank, were subsequently foreclosed, the mortgagor being made the only defendant. At the foreclosure sale thereunder the bank bought the premises. Afterwards the second mortgage was foreclosed, making the railroad company a defendant, among others,

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and the bank came in and proved its mortgages.—*Held*, that the decree should order, first, the sale of all the land (excepting the strip condemned) to satisfy, in order, all five of the mortgages, and in case of a deficiency, then the sale of that strip.

Bill to foreclose. Motion to vacate order staying sale obtained by the Central Railroad Company of New Jersey and its receiver.

Mr. T. N. McCarter, for the motion.

Mr. B. Williamson, *contra*.

THE CHANCELLOR.

This suit was brought to foreclose a mortgage for \$2,000 and interest, given to the complainant November 15th, 1870, on a tract of seventy acres of land in Perth Amboy. There is a prior mortgage on the property, and also three subsequent ones. Two of the latter—the last two—are held by the Union National Bank of Rahway, and all of them were given prior to the taking by condemnation of part of the land (two and eight-hundredths acres) by the Perth Amboy and Elizabeth Port Railroad Company. That company was subsequently, in 1873, merged in and consolidated with the Central Railroad Company of New Jersey. The amount of the award on the condemnation was paid to Moritz Pinner, who then owned the property, and he executed to the company his confirmatory deed of conveyance for the land condemned. In May, 1873, the bank filed its bill in this court, but only against Pinner, to foreclose its two mortgages. A final decree for sale of the mortgaged premises to pay the bank the amount due on its mortgages, \$10,102.75, besides interest thereon and costs and counsel fees, was entered May 4th, 1875. The land taken by the railroad company, however, was not sold under the execution, but the rest of the property was, and the bank bought it for \$100 or thereabouts, leaving a large sum still due on its decree. The sale was made in 1877. Subsequently to the filing of the bill in that suit this suit was begun. The Perth Amboy

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and Elizabeth Port Railroad Company was made a party to this suit. There was no answer by it, and a decree *pro confesso* was taken. Neither the Central Railroad Company nor the receiver was made a party. A final decree was entered and an execution issued for the sale of the mortgaged premises. It decrees that because of the foreclosure proceedings and sale thereunder before mentioned, the bank's mortgages are a lien on the railroad land, and orders that the whole of the mortgaged premises, except that land, be sold to pay the first three mortgages (but not the bank's), and that if it proves insufficient to pay them, then the railroad land is to be sold to raise the deficiency and to pay the bank's mortgages. The Central Railroad Company and the receiver seek an amendment of the decree. The bank, on the other hand, insists that they have, by negligence, lost their right to be heard on the subject. This latter objection cannot be maintained. In 1878 the decree was opened and the Central Railroad Company and its receiver made parties with leave to answer. They answered, and there the matter rested until this motion was made. The merits are now before me, and it is proper that they should be adjudicated upon. It is quite clear that the decree is erroneous. The bank's foreclosure was a nullity as against the railroad company and its receiver, and the bank very properly, in this suit, proved its claim for the amount due on its mortgages. *Vanderkemp v. Shelton*, 11 Paige 28; *Parker v. Child*, 10 C. E. Gr. 41; *Chilver v. Weston*, 12 C. E. Gr. 435; *Atwater v. West*, 1 Stew. Eq. 361. By its foreclosure it obtained all the rights of Pinner, but nothing more. The decree should provide for the sale, in the first place, of all the land, except that of the railroad company, to raise the money due on the several mortgages, including those of the bank, and then for the sale of that land in case there should be a deficiency. It will be amended accordingly.

Putnam v. Clark.

ADAH A. PUTNAM

v.

LYDIA A. CLARK et al.

Where defendants, in good faith, sever in their answers, each one may be allowed his costs, although they all may have employed the same solicitor.

Question of costs.

Mr. C. H. Hartshorne, for complainant.

Mr. C. L. Corbin, for Mrs. Clark and the executors.

THE CHANCELLOR.

The defendants, Mrs. Clark and the executors of her husband (of whom she is one), appeared by the same firm of solicitors, who filed for them their respective answers. The complainant insists that therefore there should be taxed only one bill of costs instead of two on the part of the defendants. She also insists that the executors who filed a cross-bill ought not to be allowed costs thereof. The executors were not parties to the bill as originally filed, but became so by order made on their petition. Whether separate bills of costs will be allowed where parties defendant who might have joined in their defence choose to sever, will depend on the apparent fairness of such action. If the course complained of appears to have been adopted in good faith, there is no reason why separate bills of costs should not be allowed. The costs are awarded to the client, and there seems no good reason why he should be debarred from receiving them, merely because he chooses to employ a solicitor who is already employed for another party in the suit, with whom he may join, but with whom, perhaps, he is not disposed to associate in his defence. And, on the other hand, it is not apparent why the

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complainant should reap any advantage from the mere fact that two or more of the defendants who sever in their defence appear by the same instead of different solicitors. If defendants appear by different solicitors, for the purpose of increasing the costs, and sever, when in fairness they ought to join, the court will see to it that they receive no costs of their proceedings so far as they are unfair. In the case in hand there is no ground for complaint, because Mrs. Clark and the executors severed in their defence, and they are entitled to their separate bills of costs. Objection is also made, as before stated, to the costs of the cross-bill which was filed by the executors. That bill was a defence. It was filed to set up a claim of equitable lien for taxes &c., paid on the property, to which the estate of Mr. Clark would be entitled if the complainant was successful in her suit. The executors are entitled to the costs of it.

JOEL B. LAING'S EXECUTORS

v.

MARCUS L. BYRNE et al.

1. If a grantee who has assumed the payment of a mortgage reconveys the lands in good faith to his grantor, who in turn assumes it, the liability of the former to the holder of the mortgage is terminated.
2. Where the evidence as to the delivery of a deed is conflicting, the fact that the deed itself is discovered among the papers of the grantee's solicitor is important.
3. A master may erase from his record of the evidence his note of the objection to the competency of a witness, and insert it elsewhere, so as to make a true record of the time when the objection was interposed.

Bill to foreclose. On motion for personal decree for deficiency against William J. Gibby.

Laing v. Byrne.

Mr. B. A. Vail, for the motion.

Mr. J. H. Stewart, contra.

THE CHANCELLOR.

The question to be decided is, whether the complainants are entitled to a personal decree against William J. Gibby for deficiency in the sale of mortgaged premises. Their mortgage was given in 1867 by Theodore Quick, then owner of the property, to Benjamin Price, who assigned it to their testator. Quick sold and conveyed the property in fee in 1869 to George W. Hall, subject to the mortgage, the payment whereof was assumed by the latter. In 1870 Hall conveyed the premises to William J. Gibby, in fee, subject to the mortgage, the amount of which was computed and allowed to the grantee as so much of the consideration, and the latter assumed the payment of it accordingly. For \$2,500 of the purchase-money he gave a mortgage to Hall, which the latter assigned to his daughter, Mrs. Corinthia Marsh. Under proceedings in this court for the foreclosure of that mortgage, the property was sold by the sheriff of Union county, where the land is, to Mrs. Marsh, on the 27th of October, 1875. The sale was subject to the complainant's mortgage, Joel B. Laing, who was then alive and held the mortgage, not being a party to the suit. On the 15th of November, 1875, Mrs. Marsh and her husband conveyed the property to Hall. While the foreclosure proceedings upon Mrs. Marsh's mortgage were in progress, Mr. Gibby, with his wife, executed a deed for the property in fee to Hall, conveying it subject to the mortgages, and containing a clause of assumption thereof on the part of Hall. That deed was dated on the 9th of October, 1875, but a few days before the sheriff's sale.

The complainants, on the one hand, insist that that deed was never delivered, while Gibby, on the other, insists that it was. The complainants' right to a decree for deficiency against Gibby depends on the decision of that question; for, unless Hall is entitled to indemnity from Gibby, the complainants are entitled to no decree for deficiency against the latter. Their claim rests

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wholly on subrogation or substitution, and it follows that if Hall has no claim they have none. The proof mainly consists of the testimony of Gibby and his father on the one side, and Hall on the other. To the testimony of Gibby the statutory objection is urged that, in view of the fact that the complainants sue in a representative capacity, it is not competent. A considerable amount of testimony has been taken on the question, whether objection was made to his testimony on this ground before he was examined. He insists that it was not made until after he and his father (who was sworn and testified next after him) had both completed their testimony. The complainants, on the contrary, insist that the objection was made before the witness had given any testimony. The examiner made his note of the objection on the record after the testimony of Mr. Gibby's father, but afterwards erased that entry and made another immediately before Mr. Gibby's testimony. The weight of the evidence on the subject is, that the objection was made before the witness was examined.

To consider the merits of the case on the other evidence: Mr. Gibby's father testifies positively to a verbal agreement made between Mr. Gibby and Mr. Hall, that the former should convey the property to the latter merely in consideration of an agreement in writing for a reconveyance within a year. He says that he afterwards, on behalf of his son, in view of Mr. Hall's unwillingness to bind himself in writing to reconvey, waived that consideration and delivered the deed to Mr. Hall, to whom he says he explained it, and who, he says, after the explanation, appeared to be perfectly satisfied with it and accepted it. It appears that notwithstanding the delivery of the deed, a sale under the execution in the foreclosure suit was had. Neither Mr. Gibby nor his father knew of the intention to proceed to a sale after the deed was given, but both supposed that the conveyance to Mr. Hall would prevent a sale. Mr. Gibby's father testifies that the next day, or the day after the sale took place, he called on Mr. Hall and reproached him with breaking his agreement in selling the property at sheriff's sale, stating to him that his son's principal object in conveying was to avoid the

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necessity of that proceeding. Mr. Hall replied that it would make no difference so far as the agreement was concerned. Mr. Gibby's father then asked him for the bond which had been given to Mr. Hall by Mr. Gibby, and which the mortgage held by Mrs. Marsh was made to secure, and Mr. Hall answered that it was in the hands of the solicitor who conducted the foreclosure suit, and it made no difference, that the whole matter was settled. Subsequently, according to the testimony of Mr. Gibby's father, he promised to get the bond from the solicitor and give it up. Mr. Hall, indeed, positively denies that he ever accepted the deed, but it was found in the possession of his solicitor among the papers in the foreclosure suit, and he says he got it either from Mr. Hall or from Mr. Marsh. If he got it from Mr. Marsh, the latter must have got it from Mr. Hall, for it was delivered to Mr. Hall, and not to Mr. Marsh. According to the weight of evidence, the deed was delivered to and accepted by Mr. Hall. It is quite probable that the possibility that the property would so depreciate as to expose Mr. Hall to a personal decree for deficiency with respect to the complainant's mortgage, did not suggest itself to either him or Mr. Gibby. But, however that may be, if the deed was accepted, Mr. Hall has no claim upon Mr. Gibby for indemnity, and the complainants have none. There is no evidence of fraud on the part of Mr. Gibby, and, indeed, none is even imputed. There will be no personal decree for deficiency against him.

THE NEW YORK AND GREENWOOD LAKE RAILROAD COMPANY

v.

THE HEIRS OF HENRY STANLEY, deceased.

In 1870, the defendants, in consideration that the Montclair Railroad Company would construct a depot on the premises, and stop a specified number of

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daily trains there for ten years, and build the fences along the track, agreed in writing to convey to the company the lands necessary for their track and depot. The company took possession at once, and built their track but nothing more. In 1875, under the foreclosure of a mortgage, all of the Montclair company's property was sold, and a new company organized. In 1878, under a foreclosure against the latter company, all of their property was sold, and another company, the complainants, formed. After the complainants had been incorporated, the defendants began an ejectment at law to recover their lands, and this action was enjoined by complainants and relief in equity sought. The defendants answered, protesting against the specific performance of their contract, and expressing willingness to convey the premises to complainants, on receiving compensation therefor and damages assessed as of the date when the Montclair company took possession.—*Held*, that they were equitably entitled to have their compensation and damages so estimated.

Bill for relief. On final hearing on pleadings and proofs.

Mr. R. Wayne Parker, for complainants.

Mr. Stacy G. Potts, for defendants.

THE CHANCELLOR.

On the 22d of February, 1870, the following agreement was entered into by and between the Montclair Railway Company, then a corporation of this state, and the heirs of Henry Stanley, deceased :

"In consideration of the sum of one dollar to us in hand paid by the Montclair Railway Company, and in further consideration of the benefit to us of the location of a railway depot thereon, we [the heirs of Stanley] covenant and agree that we will grant, convey and release to said company, by a good and sufficient warranty deed, upon being paid therefor the sum of one dollar, and for the foregoing consideration, all that tract or parcel of land situated in the township of Little Falls, and county of Passaic, and state of New Jersey, bounded northeast by lands of Edward Francisco, southwest by lands of Joseph S. Bowden, northwest and southeast by lines parallel to and distant fifty feet at right angles from the located centre line of the railway of said company, containing two and one-half acres of land ; also an additional width of fifty feet on each side of said land extending northwestwardly to lands of Edward Francisco and lands of John H. and Cornelius N. Stanley, from a highway to be laid out across our lands and land of said Francisco from the Peck-

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man river to the Bridge road; said company to make a lawful fence on each side of said land and maintain the same. Said deed to be upon the condition that the said company shall establish a depot within two hundred feet from said highway to be opened by us, as soon as said railway shall be in operation to the Hudson river, or to any railway connecting with the Hudson river, and shall maintain the same for ten years thereafter.

"And upon the further conditions that said railway shall be begun within two months from this date, and completed so as to be in operation within two years thereafter; all wood and timber on said lands to be cut and reserved by us, and said company shall stop not less than four passenger trains daily each way, except Sundays, at said depot, provided that so many are run over said railway for way passengers; and we further agree that said company may enter upon our said lands, and commence the work of construction before the formal conveyance may be executed, they doing no unnecessary damage; and it is further agreed that if the above conditions are not complied with by the said railway company, that this agreement holds said company to all damages if not complied with as above specified."

Under the agreement the company at once entered into possession of the right of way over the strip of one hundred feet, and constructed its railroad upon it; and it and the corporations which have succeeded to its franchises and property have ever since had it in possession, and have made use of it as part of their railroad. None of them has performed any of the conditions of the agreement, except, perhaps, that which required that the construction of the road be begun within two months from the date of the agreement.

In November, 1873, a foreclosure of a mortgage given by the Montclair Railway Company in 1870, on its property and franchises, was commenced in this court, and the mortgaged premises were sold under it September 25th, 1875. The association of the purchasers was incorporated on the 2d of October, 1875, as the Montclair and Greenwood Lake Railway Company. Under a foreclosure of a mortgage given by that company, the franchises and property were again sold in October, 1878, and the purchasers were incorporated by the name of the New York and Greenwood Lake Railroad Company. That company is the complainant in this suit. The heirs of Stanley, subsequently to the last-mentioned incorporation, began an action of ejectment in the supreme court to recover possession of the property, and the complainant thereupon filed this bill, praying an injunction

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to restrain them from prosecuting that suit, and that they may be decreed to convey to the complainant the land required for the railroad; the complainant tendering itself willing to carry out the contract in all respects as it may be settled by this court; or if it be decided that it is not entitled to the contract, and that there has been a forfeiture thereof, on its part, from which this court cannot relieve it, then that it may be decreed that the defendants convey on being paid such sum as this court shall decide that they are entitled to, for the value of the right of way, and the use thereof by the complainant since it took possession. The defendants have answered. They allege that the conditions mentioned in the agreement have not been performed, and protest against a decree for specific performance, but declare their willingness to convey on receiving compensation for their land and damages assessed as of the date when the Montclair Railway Company went into possession, with interest from that time.

The question between the parties is, whether the estimate of the value of the land and the assessment of damages should be made as of the time when the Montclair Railway Company took possession, or the time when the complainant entered into possession. There has never been any conveyance of the land to any of the companies, and none of them has ever had any legal title to it. They have all had possession, as the complainant now has, but they have all held it subject to the right of the heirs to their damages. Not only was the right to a conveyance expressly subject, by the agreement, to and dependent on the performance of the conditions, but the company thereby expressly agreed that it would pay the heirs their damages in case it should not perform the conditions. There is no allegation that there has been a waiver on the part of the defendants, nor is it claimed that they are estopped by their conduct; and there is no ground for a claim of either waiver or estoppel. The circumstances would not warrant a decree of specific performance, and such a decree would be undesirable to the complainant, as well as unjust to the defendants. The defendants plainly would have a legal right to recover the possession of their land against the Montclair

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Railway Company, and the complainant has no right superior to those which that company would have.

Whatever right in the premises the Montclair Railway Company and its immediate successor had, passed to their mortgagees, but those mortgagees obtained no right beyond that which the first-named company had. The judicial sales under the foreclosures conferred no title to the defendants' land, and the purchasers took possession of that land subject to the rights of the defendants. The defendants, then, stand before the court with all their legal rights, and its aid is invoked to compel them to desist from the assertion of those rights on according to them their full equitable rights instead thereof. The fact that the public have an interest in the maintenance of the railroad, will not affect the question as to what are those equitable rights. The public are not to be benefited or accommodated at the expense of the defendants. Their land cannot be taken without their consent for public use, without just compensation. If, then, the complainant occupies no better position than that which the party in whose place it stands would have occupied, it is plain that equity demands that the value of the land in question, and the damages to the rest of the defendant's property by reason of the taking of the land, must be estimated as of the time when the Montclair Railway Company entered into possession. The complainant has a right to equitable protection against the assertion of the defendant's legal right, to the same extent and on the same terms that the Montclair Railway Company would have been entitled to it, but to no greater extent, and on no better terms. The complainant must, in addition to the value of the land and the damages caused by the taking of it, pay also for making and maintaining the fence which, under the agreement, the Montclair Railway Company was bound to make and maintain, and which was subsequently made by the defendants at the request of that company, and on its promise to pay them for it; and it must pay the costs at law, and of this suit.

Osborne v. O'Reilly.

RICHARD B. OSBORNE

v.

PATRICK O'REILLY.

1. Construction of a contract by which complainant was to receive a certain percentage on the contract price for building a railroad.

2. A witness cannot, without leave of the court, be re-examined on a matter as to which he has been previously examined; but the ground of objection must be specifically stated when he is re-called, or his testimony will not be excluded. The rule, however, does not prevent the re-calling of a witness in rebuttal.

Bill for relief. On final hearing on pleadings and proofs.

Mr. A. Browning, for complainant.

Mr. P. L. Voorhees, for defendant.

THE CHANCELLOR.

The bill is filed for an injunction to stay proceedings in a foreign attachment, issued out of the supreme court by Patrick O'Reilly, the defendant in this suit, against Richard B. Osborne, the complainant, and for an account. The indebtedness sworn to, to obtain the attachment, was \$10,000. That suit was brought to recover moneys which, if the allegations of the bill be true, have been paid, and would be embraced in the account which the complainant seeks. The complainant alleges that on the 1st of September, 1852, he made a contract (which, however, was not then reduced to writing) with the Camden and Atlantic Railroad Company (incorporated on the 19th of March in that year), to construct their road from Cooper's Point, in Camden, to Absecon Beach, for \$241,340, including \$20,000 for the erection of terminal and water stations, of which contract price eighty per cent. was to be paid in cash, on monthly estimates,

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and the remainder to be retained as security for the due performance of the contract, until the completion of the work, and then it was to be paid one-half in the first mortgage bonds of the company, and the rest in its 'capital stock ; that on the 2d of September, 1852, and before the contract was signed, the complainant and defendant met at a hotel in Camden, and it was agreed between them that the latter should execute the contract in the place of the complainant, but under the complainant's contract, for ninety per cent. of the estimates, the remainder of the price to be retained by the complainant as his compensation for his trouble and responsibility under the contract. The complainant then owed the defendant \$1,230 for money lent to him by the latter in 1850, which sum, with \$5,500 which the defendant agreed to advance to him to enable him to buy a house in Philadelphia, was to be repaid out of the complainant's percentage before he should retain any part of it. The bill further states that, in pursuance of the agreement, the defendant entered upon and completed the work ; that he advanced the \$5,500 to the complainant ; that the first estimate was returned to the company about the middle of December, 1852, and \$10,000 in cash paid thereon, and each succeeding month thereafter estimates were made and cash paid until August, 1853, when the company became embarrassed and unable to pay in cash, but paid in notes and acceptances ; that the \$1,230 and \$5,500 were repaid to the defendant out of the complainant's percentage of the first cash payments, and that the complainant did not retain his percentage after that money was repaid, merely because, by reason of the embarrassment of the company, the payments from August, 1853, were not made in cash, and the complainant was willing to wait till the completion of the work for the rest of his compensation, and therefore was willing to turn over to the defendant all that was received from the company on construction account, so that the defendant might have all the means available for the prosecution and completion of the work. The work was completed in July, 1854. The bill further states that more than \$205,557.13 were, according to the defendant's admission, received by the complainant and paid over by him on account

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of the price of the work, and that in November, 1855, after the work was finished, the complainant, being in ill health and about to go abroad on that account, sought and obtained an interview with the defendant, and then read and explained to him a statement, being an approximate summary of the construction account and of their respective interests therein, the latter being stated in accordance with the complainant's claim on that head, and that the defendant expressed his entire satisfaction therewith; that the complainant made a settlement with the company in June, 1855, and received, with the defendant's assent, in part payment of the amount due him from the company under the contract, including extra work, and also including pay for his services as engineer, two thousand two hundred and forty shares of its common stock, amounting, at par, to \$112,000; that in 1858 he recovered a judgment against the company for \$22,500, besides costs, on claims constituting part of the compensation which the company agreed to pay for the work, and that, with the defendant's consent, he subsequently, in the same year, began a suit in this court, in insolvency, against the company, and in March, 1860, came to a final settlement with the company, with the defendant's consent, by an arrangement which was participated in by the other creditors, and was part of a general agreement by which the company was enabled to fund its debt and avoid the necessity of going into liquidation. In March, 1860, the defendant issued the before-mentioned attachment, and attached all the stocks, moneys and debts then due or coming to the complainant from the company.

The defendant, by his answer, while he admits that he made the agreement in the bill mentioned, to do the work of constructing the road, &c., denies that he agreed to allow the complainant the compensation which the latter claims, but says that, on the other hand, the agreement between them was, that the complainant was to have ten per cent. of the bonds and stocks (in amount, \$40,000) to be received by him under the contract, and that the complainant was to compensate him for any damages caused by delay in procuring the right of way for the railroad. He denies that the various suits and settlements were brought and made

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with his knowledge, and denies that he ever, in any way, admitted the complainant's claim as made in his bill.

The question now presented for consideration is, whether the complainant was to have for his compensation ten per cent. of the cost of the work or only ten per cent. of the supposed profits. The parties agree that the contract was made by the complainant with the company; that there was no written subcontract with the defendant, and that the complainant was to have a percentage for his compensation; but whether it was to be upon the whole amount of the price or only on the profits, is the subject of dispute. It is to be remarked that while there is no support of the defendant's version of the agreement between him and the complainant, there is abundant corroboration of that of the complainant. Apart from the evidence as to what was the customary compensation (which is not competent), it seems quite improbable that a contractor, holding a favorable contract likely to produce a profit of at least \$40,000, would be willing to give the advantages of it to a stranger for the comparatively insignificant consideration of ten per cent. upon such profits, especially where, as in this case, those profits could only be realized at the completion of the work, and were then payable, not in cash, but in the bonds and stocks of the company. The complainant testifies distinctly that his compensation was to be ten per cent. of the whole amount of the estimates. The written statement mentioned in the bill as having been read by the complainant to the defendant, November, 1855, corroborates him. There were present when it was read by the complainant to the defendant two other persons, John H. Osborne, the complainant's brother, and Robert Frazer, John H. Osborne's brother-in-law. They both testify to the fact that the paper was read over by the complainant to the defendant, the former dwelling upon the details, and that it was examined by the defendant, who said, after examining it, that he was perfectly satisfied with it. Both of these witnesses say that the paper was handed to the defendant, and that he took it and examined it, and after examination handed it back.

Some years afterwards, on the 7th of March, 1860, the de-

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fendant called at the complainant's house in Philadelphia, and asked him to transfer some of the stock which the latter had received in the settlement with the railroad company. The complainant declined to do so until after there should have been a settlement between them, and the defendant said that he was ready to settle then, and inquired how the account stood between them, and thereupon the complainant drew up and gave to him a statement, in which his claim was stated as it had been in the statement of November, 1855. That paper is still in the custody of the defendant. A day or two afterwards he returned a pencil copy of it to the complainant, together with a statement made by himself, dated March 9th, 1860, for a settlement between them, in which he stated the complainant's share of the profits at "ten twenty-seconds per cent.," and his own at "twelve twenty-seconds per cent." By the statement of March 7th, 1860, the complainant made claim, as he did in that of November, 1855, to ten per cent. upon the entire amount of the estimates, and that, too, not only for the work specified in the contract, but for the extra work, the latter amounting, according to the statement, to over \$100,000. The defendant, by his statement of March 9th, 1860, allows the complainant not ten per cent. on the amount of the profits, but ten twenty-second parts of the profits of the whole work, while he claims for himself the remainder; and he also charges the complainant with the \$1,230 and \$5,500 before mentioned. It is observable that in that statement he agrees with the complainant that the percentage was to be on the amount of the estimates, and not the amount of the profits. There is also in one of the defendant's books, his ledger, a statement in his handwriting, in which the complainant is allowed ten per cent. on the estimates of the whole work. He indeed says, in explanation, that that entry was made, as nearly as he can tell, after an effort on the part of the late Thomas P. Carpenter, the original solicitor of the complainant in this suit, for a settlement between the complainant and himself, thus suggesting that it was merely a copy or memorandum of a statement of the complainant's claim, and he fixes the time as sometime in the year 1860. The bill was filed in 1861. It

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may be that this suggestion of an explanation of the entry in the ledger ought to be accepted, but the defendant offers no explanation of the paper of the 9th of March, 1860. On the other hand, he declines to admit that it is his handwriting, though it is abundantly proved to be so. There is a strong corroboration of the complainant, too, in the testimony of Philip Quigley, who was connected with the defendant in a contract on a railroad in Pennsylvania, while the latter was engaged in doing the work on the Camden and Atlantic railroad. He testifies that he frequently heard the defendant speak of the construction of the latter road; that the defendant stated to him that the complainant was the contractor, and that he was doing the work on a percentage of some kind, and they would make \$50,000 apiece. The defendant, as appears by the statement of March 9th, 1860, made no distinction between work done under the contract and any other work, whether extra work or otherwise, but regarded the whole work as the subject of an account and division of profits between him and the complainant, the only question between them being as to the amount of profits to which each was entitled. It seems quite clear that the extra work is fairly within the bargain. By the last-mentioned paper (that of March 9th, 1860), the defendant deals with the matter as if a partnership in the work existed between the complainant and him, and he estimates their respective shares apparently upon some such principle. But while there is no evidence to support any claim of partnership, there is evidence in the testimony of the defendant himself that none existed, and also that he was willing to join the complainant in a partnership to do the work, but the latter declined. He says that in his first interview with the complainant, he suggested to the latter that he, the defendant, had better join him in the contract, but that the complainant refused, saying that he would not do that.

The complainant and John H. Osborne and Philip Quigley were all recalled as witnesses for the complainant without an order of the court for that purpose, and objection is made to the reception of their testimony on that ground. On the other hand, it is urged that the rule prohibiting the re-examination of

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a witness, except by leave of the court, on the same subject-matter as to which he has already testified, is not now a rule of this court; that many years ago it was made one of the standing rules, but in the revision of the rules in 1872 by the late Chancellor Zabriskie, he omitted it as being in his judgment a hindrance to justice. It is also urged that the cases of *Cranford v. Bertholf*, Sax. 458; *Delany v. Noble*, 2 Gr. Ch. 441; *Hanson v. Pres. Ch. Trenton*, 3 Stock. 441, cited by the defendant's counsel, were all decided while the rule was in existence as a standing rule. However that may be, the decision in those cases is based no less on the policy than on the rules and practice of the court, as will be seen by reference to them. It is an established rule, no less of the courts of law than of this court, and it is manifestly founded on true policy, that a witness cannot, without express leave of the court, be re-examined as to matter as to which he has already been examined. *Gres. Eq. Ev.* (54) 69; *Whart. on Ev.* § 574; *Dun. Ch. Pr.* 1104. It appears, however, by the record, that while objection was made to the examination of John H. Osborne and Quigley, on recall, the ground of objection was not stated. Such an objection is not sufficient to exclude the testimony; for *non constat*, but that if the specific objection had been made, an order of the court would have been obtained. To the re-examination of the complainant the objection was made specifically. It is obviously competent for a party to recall witnesses once sworn and examined in his behalf, for re-examination in rebuttal, without express leave of the court, and, therefore, so far as the testimony of the complainant himself is given on the recall, is in rebuttal, it is competent, but otherwise it is not.

The clear weight of the evidence is in support of the bill, and there will, therefore, be a decree for account accordingly, on the basis of the contract, including the extra work.

Parsons v. Lent.

ELWOOD PARSONS

v.

BENONI S. LENT et al.

1. Recording a mortgage in the records of assignments of mortgages, is not constructive notice.

2. That a board of directors of a company incorporated in this state, held its meetings out of the state, does not affect its title to lands acquired here.

3. Where a mortgagor gave a mortgage covering all of his interest in a corporation and in its lands—*Held*, that it was not a lien on lands then owned by him, and which he was under contract to convey, and afterwards conveyed accordingly to the corporation, superior to the title of the corporation, but only a lien on his interest in the company.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. J. S. Aitkin, for complainant.

Mr. G. S. Cannon, for the defendants, the Crystal Lake Ice Company, Harriet W. Dodge and Benoni S. Lent.

THE CHANCELLOR.

The bill is filed for the foreclosure of a mortgage given December 16th, 1872, by Benoni S. Lent to the complainant, as collateral security for the payment of a bond and mortgage for \$2,500 and interest, given the same day by Lent and his wife to the complainant on land (a farm) in Mansfield township, Burlington county. The mortgage in suit recites the giving of the principal mortgage, and states that under an agreement dated June 28th, 1872, and another supplemental to it, dated December 5th, 1872, both made by and between William H. Gatzmer, Robert S. Van Rensselaer, Algernon S. Dodge and Lent, an ice company known and designated as "The Crystal Lake Ice Com-

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pany," had been created and organized by those parties on lands of Lent, in the above-mentioned township, which he, by the agreement of June, 1872, agreed to convey to that company at a time fixed in that agreement, and that on that property a large ice-house was then in the course of erection and construction, besides other improvements, and that in and by that agreement and the supplemental one, it was expressed and stipulated that Lent was to have a two-fifths interest and ownership in the company, and in its lands and rights and appurtenances of every kind and description. It then assigns to the complainant all Lent's "right, title, interest, claim and estate of every kind and description whatsoever in said Crystal Lake Ice Company, and in all the lands, hereditaments, buildings, machinery, apparatus and appurtenances thereunto belonging; the same being his two-fifths interest therein;" and Lent thereby constitutes the complainant his attorney irrevocable in the premises, to take possession of and to dispose of his interest in the company in the event of non-payment of the principal bond and mortgage at maturity, and to pay himself in full out of it, returning to Lent the surplus; and to do all other necessary acts and things to assure and perfect his title thereto. The land in question which Lent agreed to convey to the company was part of his farm. There was a mortgage on the whole farm held by the complainant and others, executors of William Taylor, deceased. The complainant's principal mortgage expressly excepted from its operation the land to be conveyed to the company as land which Lent had agreed to convey to it. In July, 1873, the executors of Taylor released from their mortgage the excepted land which Lent was then about to convey to the company. In or about 1876, the property was sold under foreclosure of the first mortgage, and nothing was realized thereon above the amount due on that encumbrance. The mortgage in suit was not recorded in the records of mortgages, but in the records of assignments of mortgages. Van Rensselaer, Gatzmer, Lent and Dodge, and their associates were incorporated as "The Crystal Lake Ice Company," April 3d, 1873 (*P. L. of 1873 p. 1397*), and the company was organized on the 28th of June, 1873, with a capital of \$50,000, in shares

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of \$100 each, of which Lent subscribed \$200 and each of the other corporators \$100. Lent and his wife conveyed the land to the company by deed dated July 1st, 1873. On April 23d, 1878, the company gave a mortgage on it to Harriet W. Dodge to secure a loan of \$5,000 made to it by her. The complainant insists that the mortgage in suit is a mortgage of the undivided two-fifths of the land which Lent had agreed to convey to the company, and that as to that interest he is entitled to priority over the company's title and Mrs. Dodge's mortgage. He insists that the company, if it had not constructive notice, had actual notice of his mortgage when it took its deed; that it appears that the company held all its meetings out of this state, and therefore, he contends, never had any legal existence; that it never paid anything for the land, and that there is indeed no legal evidence that it ever bought it.

The land in question is a tract of about sixty acres, and, as before stated, it constituted part of Lent's farm. He sold it in March, 1872, to Dodge, Van Rensselaer, Cooper and Gatzmer for \$100 an acre, for the purpose of establishing an ice business there, or for other purposes. A written agreement to that effect was drawn, and though it was not signed by the purchasers, Lent signed a receipt written under it, acknowledging the payment to him by them of \$100 on account of the agreement. It appears to have been agreed between the parties that Lent was to join the purchasers in the contemplated enterprise of making and dealing in ice. He was to give the company a clear title to the property, and inasmuch as it would be necessary for him to have the sum of \$3,000 in cash, to enable him to obtain a release from the Taylor mortgage, the company was to pay him the \$3,000, but he was to take stock for the rest of the purchase-money. It seems that in June, 1872, an agreement was drawn, to be executed by Gatzmer, Cooper, Van Rensselaer, Dodge and Lent, by which, among other things, it was provided that they would associate themselves together under the name, style and title of "The Crystal Lake Ice Company;" that the business should be carried on on the property, which, according to the instrument, Lent was to furnish at the price of \$100 an acre; that the im-

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provements (buildings &c.) were to be put on the land, and the interest of the purchase-money to be paid by the other persons, Lent to pay no part of either; and that on the 1st of November, 1875, he was to convey to each of the others, Dodge, Van Rensselaer, Gatzmer and Cooper, an equal one-fifth of the property, retaining a fifth for himself. That instrument appears to have been unsatisfactory to Cooper, who withdrew from the enterprise, and the paper was never signed. Subsequently, and perhaps in December, 1872, there may have been another agreement drawn, by which Lent himself took Cooper's share. It does not appear that if such agreement was drawn it was ever signed. The probability is that the associates (who contemplated becoming incorporated) considered it unnecessary to sign any agreement on the subject, inasmuch as their interests could be properly and easily adjusted under the incorporation. As before stated, they were incorporated April 3d, 1873, and they subsequently took a deed for the property to the company from Lent and his wife, the consideration of which was \$6,000. In the meantime, between the time of the agreement to buy, March, 1872, and the date of the deed, July, 1873, the buildings and other improvements requisite for the business had been put on the property, Dodge, Van Rensselaer, Gatzmer and Lent advancing the money. Under a resolution of April, 1875, seventy per cent. of the capital stock subscribed was issued to the subscribers in proportion to their advances. In issuing the stock, Lent, in addition to his other advances, was credited with \$6,000 for the price of the land. He received eighty-five shares, all of which, except three which he still owns, he appears to have sold in 1875 to one Jacob Engle.

That the record of the mortgage in suit was not constructive notice to the company, there can be no doubt. The mortgage was, as before stated, recorded in the records of assignments of mortgages, and nowhere else. It was the complainant's business to see to it that it was properly recorded. Recording it in the records of assignments of mortgages was a nullity so far as notice was concerned. Nor is the complainant's position that the company was not a *bona fide* purchaser for valuable consid-

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eration, tenable. The deed to it is evidence of its purchase of the property. Of its *bona fides*, there is no room for question, and it is proved that it paid a valuable consideration.

The fact that the board held its meetings in Philadelphia will not affect the company's claim to protection in this suit. *Coe v. N. J. Midland R. R. Co.*, 4 Stew. Eq. 105, 117. Moreover, no act of its board of directors is brought in question here. The complainant seeks to enforce his mortgage against property, the legal title to which is in the company. The company had the power to acquire the property, and it appears to have done so. There is no evidence of any illegal or questionable action on its part in that matter. It does not even appear that the resolution of the board to buy the property was not passed in this state. No proof of any such resolution is in any way necessary to the validity of its title. *Ang. & Am. on Corp.* § 173.

The complainant fails, too, on the point of actual notice. He testified that he gave notice to both Van Rensselaer and Dodge of the existence of his claim under the agreement. They are both dead. There is no corroboration whatever of his testimony on the subject, and, according to his statement, nobody besides himself and them was present when he gave the notice, and he gave the notice to each of them when the other was not present. His testimony on the subject of notice to Van Rensselaer utterly fails to establish it, and as to notice to Dodge, he says that he told him that "Lent had given him a claim against his two-fifths interest," and he says he told him this on the occasion when Dodge called on him to see about obtaining the release for the property from the Taylor mortgage. In view of the fact that Dodge's errand was to obtain a release so as to give the company a clear title to its property, it seems quite improbable that he could have understood from the complainant that the latter would, when the property should have been conveyed to the company, have a claim superior to the company's title against two-fifths of it. But the mortgage in suit is itself conclusive against the complainant on this subject of notice. He never had a claim against two-fifths of the property. His mortgage transfers to him as collateral security not two-fifths of the land, but

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all Lent's right, title, interest, claim and estate in the company, and its lands &c., and the recital in the mortgage is not that Lent was to retain or have two-fifths of the land, but that he was to have a "two-fifths interest and ownership in the company, in its lands, and in its rights and appurtenances, of every kind and description." The complainant had notice, by the recital of his mortgage, that Lent had agreed to convey the land to the company, and that expensive improvements thereon were in progress, and he therefore had notice of its right. What the unexecuted instrument of June, 1872, contained, we know, but we do not know what the instrument of December following contained. Lent testifies, however, that it was no part of the arrangement between him and his associates that he was to convey a fifth to each of them, but that the agreement was that he was to convey the property to the company. Both Gatzmer and Lent deny all knowledge of the existence of the alleged agreements of June and December, 1872, and there is, in fact, no evidence that such agreements ever existed. Conceding all that the complainant swears to on the subject of notice to Van Rensselaer and Dodge, and conceding that, as he insists, notice to the attorney who drew the complainant's mortgage in suit, and who, in fact, did probably all the company's legal business, and drew the deed from Lent to it, was notice to the company, the notice was only to the effect that Lent had mortgaged his interest in the company and its property. That was not notice that the complainant claimed that his mortgage title to the land was paramount to the title of the company. On the contrary, it was notice of a fact not only not adverse to, but entirely consistent with, the absolute paramount title of the company. Indeed, the mortgage in suit and his principal mortgage not only recognize the title of the company, but the former is based upon it, conveying an interest not in Lent's land, but in the company's property. This view applies, of course, to the claim that notice to Lent was notice to the company, because, as is alleged, he was its superintendent. He, however, it may be remarked, was not superintendent at or previous to the time when the deed to the company was delivered, and if he had been, on the principle of

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the case of *Barnes v. Trenton Gas Light Co.*, 12 C. E. Gr. 33, his knowledge would not have constituted notice to the company. But, in fact, notice of the mortgage, even if it had been given to the company itself, as before shown, was not notice of any claim adverse to that of the company upon the land in question, and the claim on the land is all that is to be dealt with in this suit. The bill will be dismissed, with costs.

CLARKE MERCHANT

v.

GEORGE W. THOMPSON et ux. et al.

A married woman may, with her husband, mortgage her own lands to secure the payment of his debts or those of any other person, for the payment of which she is in no way liable.

Bill to foreclose. On final hearing on pleadings and proofs.*Mr. P. S. Scovel*, for complainant.*Mr. G. S. Cannon*, for Mrs. Thompson.

THE CHANCELLOR.

This suit is brought to foreclose a mortgage dated February 1st, 1874, for \$700 and interest, given to the complainant by George W. Thompson and his wife on lands in Burlington county, the title whereof was, at the date of the mortgage, held by Mrs. Thompson. She sets up in her defence that the circumstances under which she executed the mortgage amounted to duress, and that the mortgage was given for a debt not contracted by her, but by her husband, and for which she was in no way liable.

Woolston v. Beck.

As to the first ground: It is enough to say that the answer sets up no such defence. It may be added that the proof does not support it if it had been pleaded. As to the other ground: It is established that a married woman may, with her husband, mortgage her land to secure the payment of a debt of his or of any other person, for the payment of which she is in no way liable. *Galway v. Fullerton*, 2 C. E. Gr. 394; *Armstrong v. Ross*, 5 C. E. Gr. 118; *Peake v. La Baw*, 6 C. E. Gr. 269; *Perkins v. Elliot*, 8 C. E. Gr. 526, 532; *Campbell v. Tompkins*, 5 Stew. Eq. 170; affirmed on appeal, 6 Stew. Eq. 362; *Ferdon v. Miller*, 7 Stew. Eq. 10; *Jones on Mort.* § 113.

There will be a decree for complainant.

KEZIAH WOOLSTON

v.

JAMES B. BECK et al.

A testator gave the use of a farm to his two daughters, S. and K., for life, S. to have two-thirds of the income and K. one-third, "and after the decease of my two daughters," to their children in fee, in specified portions. S. died, leaving children.—*Held*, that K. is entitled to only one-third of the income, and the remaindermen to the other two-thirds.

Bill for construction of will and account.

Mr. J. H. Lippincott, for complainant.

Mr. C. E. Hendrickson and *Mr. B. Gummere*, for defendants.

THE CHANCELLOR.

Joseph Hillard, late of Burlington county, died in 1843. By the fourth section of his will he devised as follows:

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"*Fourth.* I give, devise and bequeath to my two daughters, Sarah Lippincott and Keziah Woolston, all that part of my farm and plantation where I now live, that is marked and numbered one (1) on the general map of the same made by Daniel Wills, the eleventh day of April, A. D. eighteen hundred and forty-two, and attached to this my last will and testament by wafer, as by reference thereto being had will more fully and at large appear, and which contains one hundred and twenty-eight acres of land, more or less, and that in the following manner, to wit:

"My daughters, Sarah Lippincott and Keziah Woolston, to have, hold, use and enjoy the same for and during the term of their natural lives, as follows, viz.: Sarah Lippincott to have the benefit and profit arising from two-thirds thereof, and Keziah Woolston to have the benefit and profit arising from the other one-third part thereof, and that for and during the term of their natural lives, and after the decease of my two daughters, Sarah Lippincott and Keziah Woolston, I then give, devise and bequeath to their children in the following manner, viz.: to Joshua Lippincott, son of daughter Sarah, to have two shares; to Matilda Woolston, daughter of my daughter Keziah, to have two shares, and the other children of my said daughters to have one share thereof, the same to them, their heirs and assigns forever. But, if in the event of the death of Matilda Woolston without lawful issue, then, in that case, her share to descend to the children of Sarah Lippincott, share and share alike."

Sarah is dead, but Keziah survives. The latter claims that she, on the death of the former (who left children), became entitled to the use of the whole of the farm for life, instead of only one-third of it, as theretofore. The estate given to Sarah and Keziah by the will is a tenancy in common, and there is therefore no survivorship. The statute would, if the property had been given to them for life in equal shares, forbid a construction which would hold that the estate is by implication a joint tenancy. It provides that no estate, after the passing of the act (February 4th, 1812), shall be considered to be an estate in joint tenancy, except it be expressly set forth in the grant or devise creating it, that it is the intention of the parties to create an estate in joint tenancy, and not an estate of tenancy in common. *Rev. 167.* Keziah is not entitled to a life estate in the whole farm, but only in the one-third. The persons to whom the remainder is given became, on the death of Sarah, entitled to the possession of the other two-thirds. The fact that, by the language of the will, the remainder is to take effect on the death of the "two daughters," will not, although only one of them is dead, prevent that

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construction. The words, "after the death of my two daughters," will be construed to mean after the death of the two respectively. A gift to A and B as tenants in common, for their lives, and "at their deaths," or "at the death of A and B," to their children, goes, on the death of each tenant for life, to his children. *Flinn v. Jenkins*, 1 Coll. 365; *Taniere v. Pearkes*, 2 Sim. & Stu. 383; *Willes v. Douglass*, 10 Beav. 44; *Turner v. Whittaker*, 19 Beav. 196; *Sarel v. Sarel*, Id. 87; *Swan v. Holmes*, 19 Beav. 471; *Abrey v. Newman*, 16 Beav. 431; *Brown v. Jarvis*, 2 De Gex, F. & J. 168; *Drakeley's Estate*, 19 Beav. 395; *Arrow v. Mellish*, 1 De Gex & S. 355; *Doe d. Patrick v. Boyle*, 13 Q. B. 100. The remainder is to Joshua Lippincott and Matilda Woolston and the other children of Sarah and Keziah. The children of Sarah and Keziah, at the testator's death, took an immediate vested interest in remainder, subject to be divested *pro tanto* upon the birth of other children. *Heater v. Van Auken*, 1 McCart. 159; *Graham v. Houghtalin*, 1 Vr. 552. As the life estates carved out of the fee cease to exist, and the fee is relieved of them, the remaindermen are entitled to possession.

 MARY H. SHREVE

v.

JOHN B. HANKINSON et al.

After a second mortgage had been taken on certain lands, a payment of part of the principal of the first mortgage was made by a brother of the mortgagor, under an agreement between the holder of the mortgage and the mortgagor and his brother, that the latter should be subrogated to the rights of the mortgagee under the mortgage for those payments.—*Held*, that, as against the holder of the second mortgage, such conventional subrogation could be enforced. The payments were, in fact, made after the second mortgage was given.

Shreve v. Hankinson.

Bill to foreclose and cross-bill. On final hearing on pleadings and proofs.

Mr. J. C. Ten Eyck, for complainant.

Mr. W. A. Barrows, for Risdon Hankinson.

Mr. F. Voorhees, for Abraham Vanderbeck.

THE CHANCELLOR.

The only litigation in this cause is that which arises out of the cross-bill filed by Risdon Hankinson to establish his claim to the security of the complainant's mortgage to the amount of \$2,500 and interest, after the complainant's claim under the mortgage shall have been paid. The mortgage was originally for \$13,700 and interest. It was given by John B. Hankinson and wife to John Fairbairn, March 25th, 1870, and was payable in four years. At Fairbairn's death it came into the hands of Joseph Becher, his executor. There were then due upon it \$11,500 of principal, besides interest. August 5th, 1876, there were paid to Becher \$1,000 on account of the principal, and on the 24th of April following, \$1,500 on the same account. The money for those payments was furnished by Risdon Hankinson, the complainant in the cross-bill, brother of the mortgagor, John B. Hankinson, at the request of the latter, and on an agreement between them (and they insist Becher so agreed also), that the former should have an interest in the mortgage to the amount of those advances, and interest for his security. On June 11th, 1877, Becher assigned the mortgage to Annie H. and Fannie S. Fairbairn, and they, March 25th, 1878, assigned it to the complainant. Risdon Hankinson's claim to subrogation is contested by Abraham Vanderbeck only. He is the holder of a subsequent mortgage given to him by John B. Hankinson on the premises. It was subsequently canceled of record, but Vanderbeck, in another suit in this court, seeks to set aside the cancellation. Both the payments made with the money advanced by Risdon Hankinson were made after Vanderbeck's mortgage was given,

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which was November 8th, 1875. That they were made by John B. Hankinson with money borrowed from his brother Risdon for the purpose, and lent by the latter to him on the agreement that the lender should have the benefit of the mortgage for his security for the repayment thereof, with interest, there is no room to doubt. And it seems quite clear, also, that Becher, to whom the payments were made, was a party to the agreement. Not only do both the Hankinsons swear to it, but the testimony of Mr. Barrows (a counselor at law) to the same effect, is positive and explicit. He testifies that, in the summer of 1876, John B. Hankinson called on and requested him to find somebody who would advance the money for the mortgage, on which there were then due of principal, \$12,000; that John B. and Risdon Hankinson consulted him with reference to the feasibility of securing the latter for the amount of an advance of \$2,500 to be paid on the mortgage, which Risdon was willing to make, provided he could be secured by means of the mortgage. Mr. Barrows, both before and after advising with more experienced counsel on the subject, advised them that Risdon could be secured by the mortgage for the sums he should advance for the payment on account of the principal thereof, and which should be so paid, provided the money should be advanced on that condition and John's promise that it should be so secured. John borrowed the money under such promise, and paid it over to Becher on account of the principal of the mortgage. Mr. Barrows further testifies as follows :

"On the 24th of April following (1871)—it may possibly have been the 23d, but my impression is that it was the 24th—Joseph Becher, executor of Fairbairn, John B. Hankinson and Risdon Hankinson, met at my office; Risdon Hankinson was then prepared to advance the further sum of \$1,500 to Becher, on the Fairbairn mortgage; in the presence of all three above named I stated how Risdon expected to be secured for the sum he was about to advance, that he was to have an interest in the Fairbairn mortgage to that extent by the promise and express agreement of John B. Hankinson and of Becher, the executor; I asked John B. Hankinson and Becher if they both promised and agreed to that effect with Risdon Hankinson; they each replied they did; Mr. Becher then explained to me that he had already received \$1,000, in August preceding, on the same agreement, and had given to John B. Hankinson a receipt for \$1,000, on account of the mortgage, as coming from Risdon Hankinson; the money was in shape of a check which was for a

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larger amount than \$1,500, as I remember it; Mr. Becher wanted the money or a certified check; Risdon Hankinson and Becher went to the bank, and returned to my office after a short interval; the money was paid to Mr. Becher in my presence, and was paid by Risdon Hankinson, on the express condition which I then and there in the presence of all of them stated, to wit, that he, Risdon Hankinson, should be subrogated to and have an interest in the Fairbairn mortgage for the moneys he so advanced to be paid thereon; and as Mr. Becher resided out of the state, he agreed to sign a paper, to be drawn up by myself, reciting the facts of the payments by Risdon Hankinson of the several sums of \$1,000 and \$1,500, on account of the mortgage, and containing an agreement that Risdon Hankinson should have an interest in the mortgage to the extent of the sums so paid by him, but which should be subject and subsequent to the interest retained by him; the interview closed before such paper could be drawn, as Mr. Becher was desirous of returning to Philadelphia on a train then about to start."

Both the Hankinsons corroborate him in this statement. In opposition, the testimony of Mr. Charles E. Hendrickson, who was Becher's attorney, is produced. The material portions of his testimony are to the effect that, before the payment of April, 1877, was made, John B. Hankinson called on him and desired to know whether Becher could not make an assignment of an interest in the mortgage to secure Risdon, if the latter should lend him the money to pay on the mortgage; that Mr. Hendrickson replied, saying that he had doubts whether such an assignment was feasible; that Hankinson then requested him to draw some paper of that kind and get Becher to sign it; that Mr. Hendrickson declined, saying he could do nothing about it until after he had consulted Becher; that Hankinson requested him to see Becher on the subject; that Becher afterwards came to his office to see him about the matter and inquired whether he could make such an assignment without prejudice to himself as executor, or to the Fairbairn girls, to whom he expected to assign the mortgage, expressing his willingness to make the assignment if it would not prejudice him or his assignees; that Mr. Hendrickson advised him against making the assignment; that Hankinson called on Mr. Hendrickson again, and the latter told him what advice he had given to Becher, and that Hankinson urged upon him the contrary view of the matter, insisting that the assignment could and ought to be made, but Mr.

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Hendrickson declined to advise Becher to make it. Mr. Hendrickson further says that when, or soon after, the payment was made, Risdon Hankinson called on him, and, after Mr. Hendrickson had communicated to him Becher's unwillingness to make the assignment, Hankinson requested him to draw a paper stating that he, Hankinson, had paid the money. He did so, and Hankinson signed it, and left it with Mr. Hendrickson. That paper was in form a certificate that Risdon Hankinson had paid to Becher, for his brother John, \$1,500, on account of the bond and mortgage; that he consented that that money should be endorsed on the mortgage as received from him, and that he claimed an interest for that money in the mortgage, but made no personal claim for it against Becher or Fairbairn's estate, or any person to whom the bond and mortgage should be assigned. The paper is dated April 30th, 1877. The \$1,500 were paid on the 24th of that month, six days previously. This paper is evidence that Risdon Hankinson, when he paid the money mentioned therein, looked to the mortgage as security for it. Becher's agreement to assign, testified to by Mr. Barrows, was made on the day the \$1,500 were paid—April 24th. John B. Hankinson swears that when the payment of August, 1876—\$1,000—was made, there was an agreement between Becher and him that when the whole of the \$2,500 was paid Risdon should have an interest in the mortgage to that amount. Becher never made the assignment. It may be that Risdon Hankinson, being apprehensive that Becher would not make the assignment according to his promise, conceived the expedient of putting his claim in writing, and leaving it with Becher's attorney. The testimony of Mr. Hendrickson does not countervail or contradict that of Mr. Barrows and the Hankinsons. Nor is the fact that when Mrs. Shreve took the assignment of the mortgage, John B. Hankinson certified on the mortgage that there was then due thereon \$9,000 of principal and \$165 of interest, at all significant. The certificate was not made by Risdon Hankinson, but by John B. Hankinson, and it was intended to estop him from denying that those amounts of principal and interest were recoverable by the holder of the mortgage, under assignment from

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the Fairbairns. It is clear from the evidence that Becher agreed that if Risdon Hankinson would advance the \$2,500 to be paid on account of the principal of the mortgage, he would give him, for security for the repayment thereof, an assignment of an interest to that amount in the mortgage; the remaining principal, and the interest thereon, to have priority over Risdon Hankinson's claim.

It is urged, on behalf of Vanderbeck, that the rule which denies subrogation in case of merely partial payment is fatal to that claim. But that rule is not applicable to this case. Risdon Hankinson's claim is for conventional, not legal, subrogation. A stranger, who, by the authority and consent of the debtor, and on his agreement that he shall be subrogated to the rights of the creditor, makes payment for the debtor, will be subrogated if the payment is made with the express declaration of the subrogation in the release made by the creditor. *Dixon on Subr. 164*. The debtor and creditor in this case expressly agreed with Risdon Hankinson that if he would furnish the \$2,500 he should have an assignment of the mortgage *pro tanto* to secure the repayment of the money. It would be against equity to deny Risdon Hankinson the benefit of that agreement. The fact that Becher did not fulfill his promise to assign could not, of course, avail him. If he were still the holder of the mortgage, he could not successfully resist the claim. No right of the complainant claiming under assignment through him will be affected by according it. Nor will any injustice be done to Vanderbeck in allowing it if he succeeds in re-instating his mortgage, for the payments in question were made after he took his mortgage. There will be a decree directing that the property be sold to raise, in the first place, the amount due the complainant, with her costs; and, in the next place, the \$2,500 and interest due Risdon Hankinson, with his costs. Vanderbeck's mortgage is, as before stated, in litigation. He proposes to appeal from the decree in his suit, and asks that the sale of the mortgaged premises be deferred until after the determination of his appeal; that is, he seeks to stay the sale and prevent the raising of the money on the complainant's mortgage until he

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shall have ascertained, by means of the appeal, whether he has any interest in the property to protect. It would obviously be unjust to accord his request.

ANTOINETTE MIDDAUGH

v.

AUGUSTUS TRIMMER, administrator &c., of Frederick Middaugh, deceased.

A covenant contained in a deed of jointure provided that the husband should invest his wife's separate estate, and account to her for the income and for the rents of her real estate. After the marriage he received all of her personal property and invested it, but never accounted for nor paid to her the income thereof, nor the rents of her real estate, which he also received. —*Held*, that his representative was, after his decease, liable to account to her therefor, with interest to be calculated with yearly rests.

Bill for relief. On final hearing on pleadings and proofs.

Mr. Nicholas Harris, Mr. C. H. Valentine and Mr. H. S. Harris, for complainant.

Mr. W. H. Morrow, for defendant.

THE CHANCELLOR.

This suit is brought by the widow of Frederick Middaugh, deceased, to obtain a decree establishing her claim against his estate for money, \$1,300, received by him from her, for her use, on the day of their marriage, and for which he never accounted, and also for the rent received by him for her real property during their marriage, and applied by him to his own use, for which also he never accounted to her. They were married at Phillips-

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burg on the 6th of October, 1864. He was then a widower, and she had never been married. She had \$1,300, of which \$400 were in gold and \$900 in legal-tender notes. Immediately before their marriage, for the purpose of jointure, he conveyed to her a house and lot in Belvidere, and gave her his bond for \$1,000, to be paid, if she should survive him, within six months after his decease, with interest from the day of his death, and they entered into an agreement of jointure by which she agreed to accept that provision, and the use for life from the time of his death, if she should survive him, of one-third of his real estate (which use he thereby secured to her), in lieu of her dower in his real property, and he covenanted with her that if the marriage should be solemnized, "he would carefully, according to the best of his skill and judgment, husband, manage and preserve her estate which she then had, and which, during the marriage, she might receive by descent, purchase or otherwise, from her relatives or others, and which might come to his hands; and that he would take and receive no part thereof to his own use, and would, after the expiration of the marriage, leave the same secure to her if any such estate should come to and remain in his hands until then." And she, on her part, covenanted that she would claim no share of his personal estate, under the statute of distributions or otherwise, but that the above-mentioned provision securing to her her own estate, should bar her therefrom, unless given to her by his will, or some act of his done after the execution of the agreement. It is proved that she had the \$1,300, and that he received that money on the day of the marriage, to hold it for her under the agreement. Besides her own testimony on the subject, numerous witnesses testify not only to his admission, but also to his voluntary declarations that he had received it at the time of the marriage, and that he had invested it. In the presence of Silas P. Hinds and Alpheus R. Hinds, he said he had invested the money, and promised to get it and give it to her. To Marshall Crutts he said he had invested the money in a house and lot in Belvidere. To Peter Bepler, who asked him if he had secured the money to her, he said he had given her good papers for it on the day of the mar-

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riage; that he was her guardian. To John S. House he said he had agreed to pay it back to her out of his estate, and that she had enough evidence in writing for her protection in what (referring to the agreement) he had given her on the day of the marriage. To Severin Reider he said he had received the money from her, and would keep it for her, and put it out at interest. To James R. Harris he said he had the money. To the commissioners of appeal in case of taxation, he declared that he owed her a debt of from \$1,000 to \$2,000, and sought a reduction of taxation on that amount, which he appears to have sometimes obtained. By the covenant he bound himself to husband, manage and preserve her estate which should come to his hands, and covenanted, also, that he would neither take nor receive any part of it to his own use, but would leave it secure to her at the dissolution of the marriage, if it should remain in his hands until that event. He received of her estate not only the \$1,300, but also all the rent of her house and lot, mentioned in the agreement, from the time of the marriage up to his death. He did not, in any way, secure those moneys, or any part of them, to her, but mingled them with or used them as his own, and he does not appear to have ever paid her any interest. By his will he gives her \$150 worth (at the appraised value) of his household furniture, directs that the bond of \$1,000 be paid in lieu of her dower, and gives her for life one-third of the net rents, issues and profits of all his real estate, except his farm and a certain house and lot in Belvidere, but makes no further or other provision for her, nor any for the payment of the money he owed her. There will be an account of the \$1,300, and the rents, with interest, which is to be calculated with yearly rests, and the defendant will be decreed to pay the amount in the due course of administration. The complainant is entitled to her costs out of the estate.

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JOSEPH OLDEN

v.

ACHSAH HUBBARD. et al.

1. A presumption of payment of a mortgage from lapse of time may be raised by a demurrer, and such a demurrer does not admit the allegations of a bill that both the principal and interest of the mortgage are now due and owing, because such allegations are rather conclusions than averments of facts.

2. Any existing circumstances which would repel such presumption must be averred in the bill.

Bill to foreclose. On general demurrer.

Mr. J. F. Hageman, for demurrant.

Mr. W. J. Gibby, for complainant.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage originally for \$400 and interest, given April 2d, 1855, by Jacob Hubbard and his wife to Joseph Olden, on land in Princeton. It states that the mortgagor died in 1857, and that by his will he gave the property to his wife during widowhood, and authorized his executor to sell it at her death or remarriage; that she is still living, and that nothing has been paid, either of principal or interest, on the mortgage, since May, 1857, when the interest was paid up to the 2d of April preceding, and \$300 on account of the principal. It states, also, that there are due on the mortgage \$100 of principal, besides interest on \$400 from April 2d, 1857 to May 17th, in that year, and on \$100 from that time. The defendant Achsah Hubbard demurs to the bill for want of equity. No payment has been made on the mortgage, as appears by the express allegation of the bill, for more than twenty-three years, and it does not appear that even any demand was made within

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that time. No explanation or excuse is offered. Under the circumstances, a presumption of satisfaction tantamount to absolute proof, arises. *Wanmaker v. Van Buskirk*, Sax. 685, 693; *Barned v. Barned*, 6 C. E. Gr. 245. The presumption, however, may be repelled by other circumstances. The question raised on the demurrer is, whether the demurrant can avail herself of the presumption as a defence on the demurrer. The complainant's counsel insists that the rule that the demurrer admits all relevant, well-pleaded facts in the bill is fatal to the demurrer; because the bill states that nothing has been paid on the mortgage since 1857, and there are both principal and interest due. It is, however, from the fact that no payment has been made in twenty years that the presumption springs, and the averment that principal and interest are due is, in this case, to be regarded as a conclusion, and not as a fact, and therefore not admitted by the demurrer. *Redmond v. Dickerson*, 1 Stock. 507, 516. Under the statements of the bill, there is nothing due. In *Wanmaker v. Van Buskirk*, it is said that the presumption prevails, not because of any actual belief that the money has been paid, but because it is right that possession should be quieted. In *Maxwell v. Kennedy*, 8 How. 210, the defence is held to be based, not only on the presumption of payment, but also on the ground that the complainant has been guilty of such laches that he is not entitled to the aid of equity, although the debt may be still unpaid. In the absence of sufficient explanation or excuse, the defendant is entitled to the benefit of the presumption on demurrer. In *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 638, Lord Redesdale, dealing with the question whether length of time could be taken advantage of on demurrer, and dissenting from Lord Thurlow's judgment in *Deloraine v. Browne*, 3 Bro. C. C. 633, says:

"If the case of the plaintiff, as stated in the bill, will not entitle him to a decree, the judgment of the court may be required by demurrer, whether the defendant ought to be compelled to answer the bill."

To the same effect is the language of Lord Eldon, in *Foster v. Hodgson*, 19 Ves. 180, 184. It is now clearly the rule of the court that the statute of limitations, or objections in analogy

Sheldon v. Stokes.

thereto upon the ground of laches, may be taken advantage of by demurrer. 1 *Dan. Ch. Pr.* 560; *Story's Eq. Pl.* §§ 484, 485; *Marsh v. Oliver*, 1 *McCart.* 259. Where the suit is one which would be barred by presumption, but for explanations or excuses, the complainant is bound to state in his bill the facts or circumstances on which he relies to repel the presumption. The demurrer will be allowed, but leave will be given to amend.

JOSEPHINE SHELDON

v.

LOUIS STOKES et al.

An allegation in a bill that the defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized upon and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale.

Injunction bill. On motion to dissolve the injunction on bill and answer.

Mr. John C. Ten Eyck, for the motion.

Mr. M. R. Sooy, contra.

THE CHANCELLOR.

The bill is an injunction bill to restrain the sheriff of Burlington county and the plaintiff in an execution in the hands of the former, from selling two parcels of land there under the execution. It states that the complainant is seized of the property by virtue of two deeds therefor—one, for one lot, from Samuel Perkins, dated November 26th, 1879, and recorded three days afterwards, the other, for the other lot, from George Rigg, dated

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February 25th, 1880, and recorded the next day; that on or about January 13th, 1881, the defendant Stokes recovered a judgment against Perkins in the supreme court for \$3,209.10, or thereabouts, and the next day issued execution thereon; that the sheriff, under and by virtue of that writ, levied on the property and has advertised it and intends to sell it, and that the complainant has requested both the sheriff and Stokes's attorney, without avail, to desist from selling the land. These are all the statements and allegations of the bill. Stokes answers, setting up fraud in the conveyances, and alleging that both parcels of land belonged to Perkins, who conveyed one directly and the other through Rigg to the complainant, who is his daughter, with intent to defraud his creditors, and that they, therefore, are null and void as against him as a creditor of Perkins. The complainant's claim for relief in equity is based on the mere fact that the defendants are proceeding to sell, under an execution against Perkins, land to which she has the legal title, and whereof, for aught that appears, she is in possession. It cannot be maintained. *Freeman v. Elmendorf*, 3 Hal. Ch. 655; *American Dock & Co. v. Trustees &c.*, 5 Stev. Eq. 428. The injunction will be dissolved, with costs.

THE LEHIGH COAL AND NAVIGATION COMPANY

v.

THE CENTRAL RAILROAD COMPANY OF NEW JERSEY.

After the appointment of a receiver of an insolvent corporation by this court, and proceedings in foreclosure, an agreement among the secured and general creditors of the corporation, was entered into, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent., payable half-yearly," and the interest was to be paid, if the company should "be able to pay it by its income, after paying claims prior thereto, within the year," and the annual interest should not be allowed to accumu-

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late. A committee to arrange the details of the plan was appointed.—*Held*, that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue; and held, also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid.

Petition for rectification of income bonds and for directions to the receiver as to the payment of interest thereon.

Mr. William Man, of New York, for the petitioners.

Mr. F. T. Frelinghuysen, for the railroad company and the receiver.

THE CHANCELLOR.

On the 14th of February, 1877, the Central Railroad Company of New Jersey was, on proceedings in this cause, adjudged insolvent, and a receiver appointed. On or about the 9th of January, 1878, those proceedings being still pending, a suit for foreclosure of the mortgage of \$20,000,000, known as "The Convertible and Consolidated Bond Mortgage," was begun. On the 3d of February, 1878, in view of that suit, an agreement for "the equitable adjustment of the affairs of the company without a foreclosure," was entered into by and between the holders of bonds of the Lehigh and Wilkesbarre Coal Company and that company itself; the holders of bonds of the American Dock and Improvement Company; the holders of the "consolidated and convertible" bonds of the Central Railroad Company; the stockholders of that company; the company itself and the receiver; the Lehigh Coal and Navigation Company; the North Pennsylvania Railroad Company, and the Delaware and Bound Brook Railroad Company. The object of the agreement was to terminate the foreclosure suit, to pay off the unfunded debt of the company, and then, with due consent, restore the company to the possession and management of its property. It contemplated, among other things, the issuing of bonds, secured by mortgage on

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property of the company not already mortgaged, to an amount not exceeding \$5,550,000, and other bonds called "income bonds," payable out of the income of the company, to an amount not exceeding \$2,036,800. The bonds secured by the mortgage were to be used in exchange for the coupons for two and a half years' interest of the "convertible and consolidated" bonds, and to secure money to be contributed by the stockholders, and the income bonds were to be used in exchange for stock surrendered under the agreement, and also, if necessary, to compromise and settle with the general unsecured creditors. The agreement provided that the income bonds should be payable "in thirty years, with interest at seven per cent., payable half-yearly," and it provided also, that the interest was to be paid if the company should "be able to pay it by its income after paying claims prior thereto, within the year," and that the interest was "not to be accumulated or carried over from one year to another." By the agreement, "a committee of detail" was appointed, to whom was committed the regulation and direction of any matter of detail which might, in their judgment or that of a majority of them, be necessary or expedient for carrying out the plan proposed by the agreement. The income bonds issued under the agreement were issued May 1st, 1878, and were made payable on or before May 1st, 1908. The floating debt has not been paid, and the receiver refuses to pay the holders of those bonds any interest, or to recognize their right to any until after that debt shall have been paid. The petitioners, for themselves and other holders of those bonds, ask that their bonds may be rectified by striking out the words giving the company an option to pay the bonds before May 1st, 1908, and that the receiver may be instructed that the income is applicable to the payment of interest on the bonds before payment of the floating debt.

When the nature of the agreement and the different interests of the various parties to it, and the great number of persons constituting some of those parties, are considered, the necessity for referring matters of detail to a committee, is evident. And by the term "matters of detail" in the agreement, was obviously meant not merely such matters as regarded the formal execution of the

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provisions of the agreement, but also such alterations in the terms of the agreement itself (not changing the plan) as might be deemed necessary or advisable to effectuate the object. In respect to the income bonds, it may have proved necessary or expedient to provide for an option to the company as to the time of payment. In all such matters it was left to the committee to determine, according to their own judgment, what would be likely to be most acceptable and most conducive to the success of the project. It is to be remembered that the plan was for the benefit of all who were interested in the company, and it was most important that it should be acceptable to and favored by as many of them as possible. Thence arose a necessity for leaving it to a committee to make such variations in the details of the plan as they might deem necessary or expedient, in order to commend it or make it satisfactory to those whose concurrence in it was solicited, and whose co-operation might be vitally necessary. The matter under consideration was within the province of the committee, and it must be presumed that they acted upon it, and that the insertion of the option was by their direction. Moreover, it is three years since the bonds were accepted, and, hitherto, no complaint has been made of the change. No ground for equitable relief is presented. The prayer for rectification will be denied. The object in issuing the income bonds for a proportion of stock surrendered, undoubtedly, was to induce the stockholders to make the advance of ten per cent. The money advanced was secured by mortgage bonds. It was evidently supposed that the plan would furnish the means of paying the floating debt. The receiver was thereby authorized to compromise and settle it by the use of the unappropriated balance of income bonds at par, or with property not otherwise disposed of by the agreement, and it was presumed that that provision was sufficient for the purpose. The exchange of income bonds for stock surrendered, was (though that was not the form of the transaction), in effect, creating preferred stock to the extent of the surrender. The floating debt has not been paid, but a large amount of it is still outstanding. The agreement makes the interest on the income bonds for any year payable, if the company is able to pay it, out

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of its income after paying claims prior thereto within the year, but otherwise it is not to be paid at all. The agreement would undoubtedly have made express provision in that connection for the previous payment of the floating debt, but for the supposition and assumption that by the plan enough money would be obtained to pay it off. But the omission to do so will not affect the construction to be put upon the agreement. The company cannot be said to be able to pay interest on those bonds in any year in which its income is necessary for the payment of its floating debt. The floating debt is a prior claim. Had the usual form of preferring the stock been adopted, the stock would, of course, have been entitled to no dividends until the debts should have been paid or provided for. The obligation to pay dividends is necessarily subject to the paramount obligation to pay the debts. It is not to be supposed that the parties to the agreement intended to give to holders of the income bonds, for which nothing was paid or to be paid, but which merely represented so much of the stock of the insolvent corporation, a lien on the annual income for their interest, after paying claims falling due within the year, whatever the amount of other indebtedness of the company might be. On the contrary, it is evident that it was the intention merely to make the interest payable out of money which otherwise would be applicable to the payment of a dividend on the stock at large. The claim under consideration cannot be supported even on the mere letter of the agreement; for the company cannot be said to be able to pay the interest out of its income, after paying all prior claims within the year, while, as yet, its debts are unpaid or unprovided for. The petition will be dismissed, with costs.

Hooper v. Hooper.

ISABEL HOOPER

v.

EDWARD HOOPER.

EDWARD HOOPER

v.

ISABEL HOOPER.

Although a wife leaves her husband's house through his fault, yet if he afterwards sincerely solicits her to return and she deliberately and persistently refuses to do so, her conduct constitutes desertion within the meaning of the divorce act.

Bills for divorce *a vinculo* for desertion

Mr. Chas. Haight, for Isabel Hooper.

Mr. C. Robbins, for Edward Hooper

THE CHANCELLOR.

These are counter-suits for divorce for desertion. The parties were married in 1857, in this state. They resided here then, and have lived here ever since. They lived together from the time of the marriage up to 1865, on a farm belonging to the husband's mother, in Monmouth county, and had one child. On the 7th of October, in that year, in the evening, Mrs. Hooper left her husband's house, and never afterwards returned to him. She alleges that the occasion of her going was that he ordered her out of the house, saying that she should not stay there another night, and threatened to kill her if she did not go away. It appears that he had been away from home at Red Bank, and

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on returning, found that no supper had been prepared for him, but his wife, who was a dress-maker, was engaged in making a dress for a customer. He seems to have become angry at this want of attention to his comfort and to have scolded her. He denies that he threatened to kill her or menaced her with any violence. She went out of the house with the dress and her lamp in her hand, taking with her her child, and went into another room of the house, occupied by a tenant of her husband. Hooper followed her out of the house, and according to the tenant's testimony, he said as she went into the tenant's room, "Yes, you can go in there and stay, but you will never come in here again." She finished her work in the tenant's room, and while there a messenger came from a neighbor, Mrs. Roberts, with a request that she would come to the latter's house the next day and take charge of it during the absence of the family at a funeral. She at once consented, saying she would go immediately, and then went into her own part of the house and made the necessary preparations, and without saying anything to her husband, who was there, left, never again to return to live with him. The next day she returned to her own house for clothes, which she obtained, and went back again to the house of Mrs. Roberts. She remained there for more than a week, and then went from there to her father's house.

She alleges that while for about three years after the marriage, her husband treated her well, after that time he was harsh and tyrannical towards her, neglected her in sickness, denied her the necessaries of life, was abusive in language to her, and even struck her. He denies all this. Her complaint as to want of necessary food and fuel appears, from the proof, to be entirely unfounded, and so, too, does her charge that her husband neglected her at the time of her confinement; and there is just reason to believe from the evidence that her representation of his treatment of her in other respects, is at least greatly exaggerated. The evidence conclusively shows a very earnest effort on his part to induce her to return to him, and a very decided refusal on her part. He swears that when she left he did not know that she did not intend to return, and that he did not consent to her going; that

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the first intimation he had that she did not intend to return was from Mrs. Roberts, to whose house she went, from whom he learned it three or four days after she left. About two weeks after she left him he saw her at her father's house, where he went with Mr. Harris, the pastor of the church of which they were both members, to induce her to return. She then agreed to do so, and promised to write to him, informing him when he should come for her to take her home. The next day or two days afterwards she wrote him a letter dated October 20th, in which she addressed him affectionately, and said that she had consulted with her parents, and had concluded to return to him, and that she had not fully regained her confidence in him, but would trust the future to prove his faithfulness and truthfulness; that she wished him to go to Mrs. Roberts and Mrs. Sears, two of her neighbors, before coming for her, and tell them the whole truth; that they had been her firm and fast friends, and that by his taking that course they would regard him in a new light; and that after that he might come for her when it suited his convenience. He received this letter through the post-office in the evening and the next morning went with his covered carriage to her father's house for her. When he arrived there she was not at home. He waited for her all day, but she did not return, and he went home again. An evening or two after that, he received another letter from her, dated October 22d, in which, addressing him most formally, she said that upon considering the past, she had thought best to take legal advice, and had concluded that she would never return to him. On receipt of this letter, which he got from the post-office in the evening, he set out on foot for her father's house, and walked the entire distance of about seven miles and a half, reaching the house at about eleven o'clock at night. He saw her. She merely asked him what he was doing up there at that time of night, and declined to talk further with him, but took their child, which was asleep, and started to go up stairs with it. He begged her to let him see the child, but she would not stop, and he then asked her if she would not give him a lock of its hair. She carried the child away up stairs and would have no interview with him, and he soon afterwards left the house

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and went home again. She never returned to his house again, except on two occasions, one, he says, about one year and the other about two years after that time, and on both occasions she merely came to get her clothes and furniture, which, however, he refused to permit her to take, because, as he says, he thought that by permitting her to take them he would be held to have consented to her living separate from him. From the time when she left his house she has supported herself, and she has never had any communication with him, except in her efforts to get her clothes and furniture, and though the child became sick and died, she did not inform him either of its sickness or death. It is a notable circumstance, that in the interview before mentioned, at which Mr. Harris, their pastor, was present, she did not complain that her husband had treated her with cruelty or express any apprehension of bodily harm if she were to return to him, but gave as her reason that she was discontented and could live more to her liking away from him. Mr. Harris says :

"Her reasons were that 'they were isolated where they lived,' that 'she had no society;' that 'she wanted to live better than they did there, as to dress, appearances,' &c.—that was about the sum and substance of it; she did not refer to violence to her or fear on her part, of her husband; in a general way as to unkind treatment of which she spoke, as I have said, she said 'that her husband did not get everything she wanted, and was sometimes peevish and cold, and denied her some things,' but by unkind treatment I did not mean, nor did she speak of anything by way of force or violence; the burden of her complaint was that she expected to live better and appear in society, and was discontented in not realizing these things, and could do better at her father's; when she spoke of not being properly provided for, it was in the way I have just mentioned."

And when, some weeks afterwards, a committee of the church, to which she had made application for a letter of dismission, called on her on the subject and talked with her as to her relations to her husband, she gave only the like reason for her refusal to live with him. Her friend, Mrs. Roberts, one of the neighbors mentioned in her letter of October 20th to her husband, and the person to whose house she went when she left her husband (and she staid there over a week before she went to her

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father's house) says that she never complained to her of her husband's treatment, but only that, as the witness expresses it, "she did not have the necessaries on the table she would like to have."

It is not at all improbable that the disparity between their ages (she was then twenty-five and he forty-six), and the difference in their tastes and dispositions, were the occasion, to a great extent, at least, of her discontent.

The wife relies for a decree in her favor on the principle that when a husband treats his wife with such cruelty or violence that she is obliged to leave him for safety or to avoid personal injury, such compulsory flight amounts to a desertion by him; and if he does not seek her and try to persuade her to return, with promises of amendment, such absence, if continued for the requisite time, is a willful and obstinate desertion on his part. *Laing v. Laing*, 6 C. E. Gr. 248; *Palmer v. Palmer*, 7 C. E. Gr. 88. By her bill, her claim to a divorce is based on the allegation that previously to October her husband had treated her with cruelty, and on that day drove her from the house, and refused to permit her to return to it, and that he has never since offered her a home or made any provision for her wants. The last branch of this allegation is not only not sustained, but is positively disproved. The evidence establishes the fact that, very soon after she left her husband's house, he took measures, as before mentioned, to induce her to return, and it not only appears that he was sincere in his efforts and anxious to have her return, but that he was greatly distressed at her refusal. His conduct on receiving her letter refusing to return is abundant evidence of his sincerity. He received it in the evening, and, as before stated, at once set out on foot for her father's house, a distance of about seven miles and a half, through a storm. The next morning he went to the house of Mr. Harris with the letter, and showed and read it to him. Mr. Harris says that Hooper was very nervous and very much affected by the disappointment; that tears ran down his cheeks and he trembled. The committee of the church endeavored to induce her to return to her husband, but she refused. She says in the letter in which she refused to return, that she did so through legal advice, but she admits that

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that was untrue; that she had not, in fact, taken any legal advice. It was clearly her duty to return to her husband under the circumstances, when he solicited her to come back to him. She deliberately determined, however, that she would never return, and for fifteen years before she filed her bill she had kept her determination. From the time when she refused to return, she deserted him.

Her bill will be dismissed, and a divorce will be decreed to him.

JOHN V. TERHUNE

v.

MARY C. WHITE, executrix, et al.

1. A claim against the estate of a decedent on his assumption of a mortgage is, before foreclosure, only contingent, and consequently cannot be proved as a debt against his estate before that time.

2. There must be a decree of the orphans court, or creditors' claims, although not presented within the prescribed time, are not barred.

Bill to compel payment of the deficiency existing after applying the proceeds of the sale of mortgaged premises to the mortgage. On rehearing of decree advised by an advisory master.

Mr. E. E. Green and *Mr. J. Wilson*, for defendant executrix of George White.

Mr. J. F. Hageman, jun., for complainant.

THE CHANCELLOR.

A rehearing of this cause is sought by the defendant, the executrix of George White, deceased. The suit is brought to

Terhune v. White.

establish and enforce her liability to pay deficiency. The advisory master to whom the cause was referred advises that a decree be made against her. The facts are, that the premises were conveyed to White in 1872, subject to several mortgages, among which was that of the complainant, and he assumed the payment of the latter encumbrance as part of the consideration of the conveyance. White died February 15th, 1872. His will was proved on the 27th of that month. On the same day, an order of the orphans court was duly made, requiring the creditors of the estate to bring in their claims within nine months. Publication of it was made, as required by law. The time limited expired November 27th, 1877. The complainant never put in his claim. In 1878, he began a suit in this court to foreclose his mortgage, and the premises were sold under the final decree therein in November of that year. There was a deficiency. This suit was brought in 1879. The liability which it is brought to establish and enforce is purely equitable, resting wholly on the doctrine of equitable subrogation; and while it may be said to have existed in contemplation of equity, under the circumstances which the case presents, from the time when the assumption was made, yet it was from the time when the deed to White was given, subject to extinguishment by the *bona fide* action of the parties to that deed, and their legal representatives, up to the time when the proceedings in foreclosure were begun. *Crowell v. Hosp. of St. Barnabas*, 12 C. E. Gr. 650. And, moreover, it was not enforceable, and was, therefore, merely contingent at most, until the fact of the existence of a deficiency had been established. It could not have been, before that time, proved as a claim against the estate of White, for it was a mere contingent equity, and in no sense a legal liability. Apart from that consideration, under the facts the order to limit creditors of itself constitutes no bar to the decree sought in this suit. It is not alleged that the estate of White proved insolvent, and the order was not followed by a final decree of the orphans court barring creditors. By the sixty-second section of the orphans court act (*Rev. 764*), it is provided that after the expiration of the time limited in the order, the orphans

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court, upon proof to its satisfaction that the notice has been set up and advertised as directed, may, by final decree, order that all creditors who have not brought in their claims within the time in the order directed shall be barred from any action therefor against the executor or administrator; and that any creditor who shall have neglected to bring in his debt, demand or claim within the time so limited shall, by such decree, be forever barred of his action therefor against such executor or administrator, except as hereinafter provided; and the proviso referred to is, that in case such creditor so failing to present his debt, demand or claim shall, after the final settlement of the account of the executor or administrator, find some other estate not accounted for, he shall be entitled to have his debt, demand or claim paid thereout, or a ratable proportion thereof, in case other creditors shall be barred of their debts, demands or claims. Before the passage of the Revision the order and notice constituted such bar. *Nix. Dig. 653 § 70*; *Ryan v. Flanagan's Admr.*, 9 Vr. 161. And it was provided that the orphans court might, on proof to its satisfaction of the publication of the order to limit, by its final decree, order that all creditors who had not come in within the time limited should be barred; and it was also provided that the decree should be conclusive. *Nix. Dig. 308 § 29*. By the Revision, the law has been changed, and the revised act declares in terms that the decree shall constitute the bar. It is not profitable to consider whether it was within the province of the revisers to make such alteration in the law, for the act as it stands is not their act, but the act of the law-making power. It is urged on the part of the complainant that the supreme court, in *Ryder v. Wilson's Exr.*, 12 Vr. 9, construed the provision under consideration, and held that, except there be a decree, there will be no bar. This court, in the construction of a statute, follows that which the courts of law have put upon it. Such is necessarily the rule. It is obvious that a different rule would produce infinite confusion. The supreme court, however, in the case referred to, does not construe the act, and what is said on the subject is a mere statement of the position of the demurrant, yet it is manifest from the opinion that it assumes

Taylor v. Trustees of Bryn Mawr College.

that, by the revision, a change was introduced, and that now there is no bar unless there be a final decree.

The decree will be signed, as advised by the master.



THE EXECUTORS OF JOSEPH W. TAYLOR, deceased,

v.

THE TRUSTEES OF BRYN MAWR COLLEGE et al.

1. A gift of a fund to establish and maintain a school of learning is a charitable trust.

2. This court will not administer a foreign charity, but where such a charity is valid by the laws of this state, and by the laws of the state where it is to be executed, and the trustees have the legal capacity to receive the fund and carry out the charity, this court will order its payment to them.

Bill for construction of will and directions. On final hearing on pleadings.

Mr. B. Gummere, for complainants.

Mr. P. L. Voorhees, for trustees of Bryn Mawr College.

THE CHANCELLOR.

This is a suit brought by the executors of Joseph W. Taylor, deceased, late of Burlington county, for construction of the residuary clause of his will, and consequent directions as to the disposition of the residue of his estate. The testator, by that clause, gives all the residue to eleven persons, whom he names (by the codicil he adds two more, whom he also designates), or the survivors of them, in trust, as soon as a corporation shall be established under the laws of Pennsylvania, for a college or institution of learning, having for its object the advanced education

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of females, as thereafter set forth, to be under the care and management of the trustees or others that they may from time to time appoint to fill vacancies in their number, and authorizes and directs that his executors, after having paid or made provision for all the legacies and bequests thereinbefore given and made, convey, assign and transfer all the residue of his estate to the corporation absolutely, without further responsibility on their part. He then provides that the trustees of the corporation may proceed to expend a portion of the principal in purchase of suitable ground, to be chosen with care by them, and the erection thereon of substantial, sightly and suitable buildings of the most approved construction, for the comfort, advanced education and care of young women or girls of the higher and more refined classes of society, and gives them directions where to locate the site, unless it should have been obtained previously. The trustees are to have power, from time to time, to fill vacancies in their number (keeping it as fixed by him), the new trustees to be members of the society of Orthodox Friends, of which he himself was a member; and he expresses his desire that in the selection and appointment of trustees great care shall be taken to choose competent Friends of high moral and religious character, possessing enlarged and enlightened and cultivated minds, as far as practicable. He gives the trustees power to sell and convey any or all of the real estate "devised as above," or any that may be purchased by them, from time to time, for the trust, without liability on the part of the purchasers for the application of the purchase-money. He then provides that the trustees "having charge and control of said corporation" are, after coming into possession of the residue, to retain sufficient to pay for the ground and needful buildings, furniture &c. &c., for the institution, and are to invest the remainder for an endowment fund, the income from which they are to apply to the necessary expenses and support of the college or institution for all time to come; and he empowers them, if it be found necessary, in their discretion, to spend part of the principal for that purpose, expressing his desire, however, that they infringe upon the principal as little as possible. By the codicil, he revokes the power

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to
trustees of
trench upon the principal. He gives directions to the trustees as to the character of investments to be made by them of the endowment fund, and provides that they are to have power to hold at discretion any securities that may pass into their hands from his estate. He gives directions as to the admission of students, providing that, other things being equal, preference is to be given to members of the Society of Friends, and requiring that students who may not be members of that society must conform to the customs and rules of the institution, and be willing to be educated in the same manner as students who are of that society. He adds various expressions of his wishes in regard to the mode of education; some of a mandatory and others of a precatory character. By the codicil, he appoints, as before mentioned, two additional trustees to the eleven named in the will, and designates the thirteen as trustees of his residuary estate and of the college. He also appoints one of them, Francis T. King, president of the board. The will is dated on the 19th day of February, 1877, and the codicil on the 25th of October following. The testator died in January, 1880. Before his death he purchased the site for the buildings and began to erect them, and he was proceeding with the work when he died. The site selected was at Bryn Mawr, in Pennsylvania. The executors have filed their final account. The residuary estate is very large, about \$750,000.

The persons named in the will and codicil as trustees, in May, 1880, became incorporated under the general law of Pennsylvania by the name of "The Trustees of Bryn Mawr College," and they now apply to the executors for the transfer to them of the residuary estate. All of the trustees except one reside out of this state. Of the non-residents, one resides in New York, one in Maryland, one in Rhode Island, and the rest in Pennsylvania. The executors, in view of the large amount of the residuary estate, the fact that, if the claim of the corporation be conceded, the estate will pass out of the jurisdiction of the courts of this state, the doubt which has been suggested as to whether the corporation is entitled to receive anything from them, and their unwillingness to determine for themselves, even with the aid of

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counsel, whether the corporation, if entitled to receive the residue from them, is a lawful corporation, and such as was intended by the testator, come into this court for advice.

The trust under consideration is clearly a charitable one, within the statute of 43 Elizabeth, c. 4. That act includes in its specification of charitable uses not only free schools but "schools for learning," without the qualification that the instruction therein shall be gratuitous. The law of this state does not differ from the common law of England on the subject, which has grown up in a series of decisions founded in part on that statute. *Thomson's Exrs. v. Norris*, 5 C. E. Gr. 489. And the trust is, therefore, a charitable one, according to our law. *Van Wagenen v. Baldwin*, 3 Hal. Ch. 211; *Mason's Exrs. v. Trustees &c.*, 12 C. E. Gr. 53; *Stevens v. Shippen*, 1 Stew. Eq. 533; *De Camp v. Dobbins*, 2 Stew. Eq. 36; *S. C. on appeal*, 4 Stew. Eq. 671. And it is a charitable one according to the law of Pennsylvania. *Price v. Maxwell*, 28 Penna. St. 23. It was said in that case, that though the statute of 43 Elizabeth, c. 4, is not strictly in force in that state on account of the inapplicability of its regulations as to modes of proceeding, its conservative provisions have been in force by common usage and constitutional recognition; and not only they, but the more extensive range of charitable uses which chancery supported before and beyond that statute. See, also, *Pickering v. Shotwell*, 10 Pa. St. 23.

Nor does the fact that the charity is a foreign one constitute a valid objection to the gift. This court will not administer a foreign charity, but it will direct money devoted to such use (provided the charity is not repugnant to our laws or policy, and is in accordance with the laws of such state) to be paid to the proper parties, leaving it to the courts of the state within which the charity is to be established to see to its due administration. *Hill on Trustees* 468; *Story Eq. Jur.* § 1184; *Tudor's Law of Char. Trusts* 259; *Boyle on Char.* 134; *Perry on Trusts* § 741. In *Attorney-General v. Sturge*, 19 Beav. 597, a testatrix who had established a school at Genoa, by her will directed that \$1,000 be paid to Mr. Irvine, the consular chaplain there, for its support. Mr. Irvine being dead, the legacy was, after an inquiry,

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ordered to be carried to a separate account, and the dividends paid to the consular chaplain for the time being, he rendering periodically to the judge at chambers and to the attorney-general an account of its application. In *Attorney-General v. Lepine, 2 Swanst. *181*, residuary estate was bequeathed to the ministers and church officers for the time being of a parish in Scotland, for a charitable purpose. It was directed that the estate be invested in stock in the name of the accountant-general, and the dividends paid from time to time to the minister and church officers, and an order approving a scheme reported by a master for the administration of the charity was reversed. In *Provost, Bailiff &c. of Edinburgh, v. Aubery, Amb. 236*, there was a bequest of annuities to the plaintiffs, to be applied to charity. Lord Hardwick, was of opinion that he could not give any directions as to the distribution of the money, inasmuch as that belonged to another jurisdiction—that is, to some of the courts in Scotland—and therefore directed that the annuities be transferred to such persons as the plaintiffs should appoint, to be applied to the trusts in the will. See, also, *Emery v. Hill, 1 Russ. 112*; *Martin v. Paxton*, cited therein, and *Minet v. Vulliamy*, in note; *Mitford v. Reynolds, 1. Phil. 185*; *Forbes v. Forbes. 18 Beav. 552*, and *Collyer v. Burnett, Taml. 79*.

Corporations are capable of being trustees for charitable purposes, and where they have perpetual succession, that qualification peculiarly fits them for such trusts as this. *Whiteford's Law of Char. 2*; *Tudor's Law of Char. Trusts 387*.

The existence of a foreign corporation, organized under the laws of the state where the charity is to be administered, will be recognized by this court, and the fund committed to it, if, by the law of its creation, such corporation has the requisite powers and competency in the premises. *Chamberlain v. Chamberlain, 43 N. Y. 437*. But it is obviously due to the proper administration of justice that this court should, before ordering the payment, be fully satisfied as to the qualifications of the corporation. In the case in hand the testator intended that the trustees whom he named should become incorporated under the laws of Pennsylvania, and that the trust should be wholly administered by means of

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the corporation. The gift to the trustees was intended to support the trusts until the corporation should have been created. It is to the persons named, in trust, "as soon as a corporation shall be established" &c. Such a gift is clearly valid. *Inglis v. Sailors' Snug Harbor*, 3 Pet. 99; *Trustees Cory Universalist Society v. Beatty*, 1 Stew. Eq. 570; *Stevens v. Shippen*, Id. 487, and *Goodell v. Union Ass'n*, 2 Stew. Eq. 32. He directs his executors to convey, assign and transfer all the residue to the corporation absolutely, without further responsibility on their part, and thereafter everything is to be done by the corporation. It is not the trustees as individuals, but "the trustees of the corporation," who are empowered to expend a portion of the principal in the purchase of land and the erection of buildings, and it is the same trustees to whom the power of sale is given; and the power is full and complete, extending to all the land which may constitute part of the residue, as well as all land which they may acquire otherwise. It is the trustees "having charge and control of said corporation" who are to invest the money constituting the endowment fund and apply the income, and to them is given, by the will, power to expend a part of the principal in the payment of the necessary expenses and support of the institution. Though this power is withdrawn by the codicil, the gift of it by the will is further evidence, if any were needed, of the testator's intention that the corporation should hold and manage the *corpus* of the fund. It is to the trustees of the corporation that he gives directions as to investments, and he expressly gives them power to hold any securities that may pass into their hands from his estate, thus clearly indicating his intention that the corporation should hold the *corpus*. He did not intend that the trustees whom he named, and their successors, should constitute a distinct body from the corporation, but that they should become the corporation.

"The Trustees of Bryn Mawr College" are a perpetual corporation under the laws of Pennsylvania, established (in the very language of the will) "for a college or institution of learning, having for its object the advanced education of females," as set forth in the will, and to receive the property, real and personal,

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devised and bequeathed for the purpose by the testator, together with such other estate, real and personal, as may be hereafter acquired. Its charter provides for thirteen trustees, and that no one shall be a member of the corporation who shall not be a member of the Society of Orthodox Friends. It provides, also, for the admission and education of students in conformity with the testator's wishes as expressed in the will. The affairs of the corporation are to be managed by the thirteen trustees. Francis T. King is the president. The charter provides that, as to so much of the property as shall be derived from the testator's estate, it shall be used, managed and disposed of subject to the restrictions and in accordance with the directions of the will. All the requirements for the lawful formation of the corporation appear to have been complied with, and the legally appointed judicial authority has, by order, so certified, and has decreed that the charter be and is approved, and that upon the recording thereof, and of the order (which has been done), the subscribers thereto, and their associates, shall be a corporation for the purposes, and upon the terms stated in the charter. The corporation is fully competent to receive and administer the fund according to the intentions of the testator, and it must necessarily be left to the courts of Pennsylvania to see to the proper administration of the trust.

There will, therefore, be a decree that "The Trustees of Bryn Mawr College" are entitled to receive the residue of the estate, and that the executors pay it over to them accordingly.

THE PORTLAND BUILDING ASSOCIATION

v.

AMOS W. CREAMER et al.

A creditor's bill was filed to set aside as fraudulent a conveyance of lands, about one-half of which was woodland.—*Held*, that an injunction which restrained

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the grantee from cutting and removing the wood from the premises, would not be continued, it appearing that the value of the land, without the wood, was ample to satisfy the creditor's claim, in case the conveyance should ultimately be annulled.

Creditor's bill. Motion to dissolve injunction on bill and answer and affidavits annexed thereto, respectively.

Mr. J. F. Dumont, for the motion.

Mr. H. S. Harris, *contra*.

THE CHANCELLOR.

The bill is filed by a creditor of William Creamer to set aside a conveyance made November 19th, 1879, by him to his brother, Amos W. Creamer, of the real property of the former, which is situated in Knowlton township, Warren county. It consisted, according to the deed, of two tracts particularly described, containing about two hundred and sixty-five and a half acres (but, according to the statements of the pleadings and affidavits, containing only about two hundred and twenty-six acres), and "all other tracts or parcels of land and premises of the said William Creamer, owned or possessed by him, or to which he was, at the date of the deed, in any way entitled in that township." Of the land particularly described, it appears that about one hundred acres are woodland, and the timber thereon alone is said to be worth \$40 per acre. Amos (who alone has answered) swears, in his affidavit annexed to the answer, that the property is worth \$2,000 "if every tree is stripped off of it." The value of the property, then, from these statements, would seem to be at least \$6,000. In an affidavit attached to the bill, it is sworn that, at the date of the deed, the property was worth, at a fair market valuation, \$7,000. It is probably not worth any less now. According to the deed, the consideration of the conveyance to Amos was \$5,000, and a decree of this court in favor of Joseph Andrews, jun., for foreclosure and sale of the property, on which there were due June 16th, 1879, \$1,834.39; two judgments against

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William Creamer, on which there were due at that date \$1,248.82; and another against him in favor of the grantee, on which there were due at that date, \$1,158.89; besides further interest on those claims and costs of suit thereon, were computed and allowed as so much of the consideration. There were other judgments against the grantor, the amount due on which constituted, Amos says, the balance of the consideration. Under the execution in the foreclosure suit, the property was advertised to be sold on the 3d of November, 1879, and the sale was then adjourned for one month. A few days after the adjournment, William Creamer proposed, according to the statements of the answer, to his brother Amos, that the latter should buy the property of him for the amount of the encumbrances then on it, to which Amos consented, and a deed was made accordingly. It appears that one of the purposes to be answered by the sale to Amos, was the keeping of William in possession of the property (it was all he had) as his home, and he has ever since continued to occupy it without paying any rent, except the annual taxes. Nothing was paid on account of the consideration of the deed until about the 15th of December, nearly a month after the deed was delivered, and then the amount due the complainant in the foreclosure suit was paid, but the grantee took an assignment of the decree and directed the sheriff to adjourn the sale, and it was adjourned, at his direction, from month to month, until the 12th of November, 1880, when it was again adjourned to the 10th of December following. The bill was filed November 22d, 1880, and it prayed, among other things, an injunction to prevent Amos W. Creamer from cutting the wood and timber off the property. Up to the time of filing the bill he had, as before stated, continued the adjournment of the sale, and it then stood adjourned by him to the 10th of the following month. The complainant began suit in the Warren circuit court on its claim, which was against William Creamer, as surety on a promissory note held by it, on the 18th of April, 1879, and recovered judgment against him thereon January 26th, 1880, for \$358.98. It issued execution on the judgment and levied on the property in question. At each of the various adjournments

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its agent or agents attended the sale, and were ready to bid enough for the property to reach and secure its claim after paying prior encumbrances out of the proceeds. On the case, as it stands, there are these facts: The debtor conveyed the property to his brother, one of his creditors (and his brother's claim was second in order of priority), in consideration, as they allege, of the brother's agreement to pay off the encumbrances. One of their purposes was, it is admitted, to keep the debtor in possession of the property, and, to that end, to keep his creditors from selling it away from him. When the brother paid the creditor whose lien was prior to his (which payment was, as before mentioned, not made until about a month after the conveyance), he took an assignment of that creditor's claim, and adjourned the sale of the property from time to time, to prevent (according to his statement) other creditors, who had judgments prior in lien to the date of his deed, from advertising the property for sale under their judgments. By sale under the execution, the lien of those judgments would have been extinguished. When the bill was filed, which was more than a year after the date of the deed, the sale stood adjourned. Amos's debt was secure if the property had been sold under the execution. It was, as before stated, the second in order of priority. It is sworn that the property was worth \$7,000, while the encumbrances on it, when the deed was given, were, according to the answer, but about \$5,000, and that the complainant in this suit was ready to buy it at the sheriff's sale at a price sufficient to cover all those claims. It appears by the answer that, at the filing of the answer, Amos had paid off all the encumbrances subject to which he took the property, and had discontinued the adjournment of the sheriff's sale. There appears to me to be no reason for continuing the injunction (which is only against cutting the wood and timber), for it is not denied that, after they shall have been removed from the property, there will still be enough value in it to secure the complainant's debt and costs, if it shall be successful in this suit. The injunction will therefore be dissolved, but without costs.

Naar v. Union and Essex Land Co.

REBECCA NAAR et al.

v.

THE UNION AND ESSEX LAND COMPANY et al.

1. An answer to a foreclosure bill stated that the complainants, in consideration of \$500, stipulated "to agree to the conditions of the mortgage."—*Held*, that the allegation was not sustained by proof that the complainants, in consideration of \$500, agreed to take the mortgage in suit in substitution for another of the same amount on other property.

2. Since the act of 1880 (*P. L. of 1880 p. 255*) there can be no decree for deficiency in a foreclosure suit against the obligors in the bond secured by the mortgage in suit.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. P. H. Gilhooly, for complainant.

Mr. W. R. Wilson, for defendants Stevens and Clark.

THE CHANCELLOR.

The questions presented by the briefs of counsel are, first, whether the defence of usury set up in the answer of one of the defendants is sustained; and, second, whether, in view of the provisions of the first section of the act "concerning proceedings on bonds and mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder" (*P. L. of 1880 p. 255*), the complainants are entitled to a decree for deficiency against the obligors in the bond, the payment of which their mortgage was given to secure. The suit was begun after that act took effect. The defence of usury is based on the allegation in the answer of James H. Clark that there was an agreement between the complainants and the obligors in the bond secured by the mortgage, that the former "would agree to the conditions of the mortgage" if the obligors in the bond

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would pay them a premium of \$500, and secure the payment of the mortgage-money by giving the mortgage and the bond. The proof does not sustain the allegation, but is to the effect that there was an agreement that, in consideration that the complainants would lend the money secured by the mortgage on the security of the mortgage, and of the responsibility of the obligors, they should receive \$500. It appears from the evidence that the defendants the Union and Essex Land Company owned a tract of land at or near Linden, which was then subject to a mortgage for \$21,000 and interest, given by Amos Clark, jun., and held by the complainants. The company were bound by covenant to remove that mortgage from the property. Being unable to pay it off, it was agreed between them and the complainants that if the latter would cancel the mortgage and take another instead of it for the same amount on other real property of the company, the company, in consideration thereof, would pay the complainants \$500. In accordance with the agreement, the first-mentioned mortgage was canceled, and the mortgage now in suit was substituted therefor, and the \$500 were paid. The answer of the defendant Clark does not aver that the \$500 were to be paid for that accommodation, or for the loan of the money, but, as before stated, alleges that they were to be paid in consideration that the complainants would "agree to the conditions of the mortgage." What, precisely, is meant by that allegation is left to conjecture. The defence of usury is not established. The *allegata* and the *probata* do not agree.

As to the other question, the act of 1880, whose title is given above (and which, by its terms, took effect immediately), provides that in all proceedings to foreclose mortgages thereafter commenced, no decree shall be rendered for any balance of money which may be due complainant over and above the proceeds of the sale or sales of the mortgaged premises, and that no execution shall issue for the collection of such balance under such foreclosure proceedings. As before stated, this suit was begun after the approval of that act. The persons against

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whom personal decree for deficiency is prayed are all of them obligors in the bond.

In *Newark Savings Institution v. Forman*, 6 Stew. Eq. 436, it was held that that section was not applicable as to persons against whom the legal remedy remains, in contravention of the constitutional prohibition against laws depriving a party of his remedy. There will be no decree for deficiency, therefore, in this suit.

MARY MAAS

v.

HENRY MAAS.

A husband, who treated his wife with extreme cruelty and drove her from his house under a menace that he would kill her if she did not go, and threatened to have a constable put her out of his house when she returned and applied to him for support, was required to give security for the maintenance of his wife and child, a boy five years of age, notwithstanding his allegation and oath that he expelled her because he detected her in adultery, his testimony on the subject not being corroborated, but, on the other hand, being overborne by that of the wife and her alleged paramour.

Bill for alimony. On final hearing on pleadings and proofs.

Mr. P. H. Gilhooly, for complainant.

Mr. T. F. McCormick, for defendant.

THE CHANCELLOR.

This suit is brought to compel the defendant to provide a proper support for his wife, the complainant, and their child. On or about the 26th of May, 1880, he drove his wife from his house without making any provision for her support. They

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lived in Elizabeth, where he still resides. He compelled her to go, under a threat that if she did not he would kill her. He has never provided anything for her since he drove her away. After she left his house, she was, up to the time of the payment of alimony *pendente lite* in this suit, wholly dependent for her support and that of her child—a boy of about five years of age—on her sisters, with whom she lives, in New York. They are single women, and maintain themselves by their labor. To her application to him for support, made in June following her expulsion, he returned an absolute and unqualified refusal, declaring that she was not his wife, and ordered her out of his house, threatening that if she did not go he would get a constable and put her out. That he had treated her with extreme cruelty in the preceding winter, there seems to be no reason to doubt, although he denies it. He attempts to justify his conduct in expelling her from his house in May and refusing to support her ever since, by the allegation that he detected her in the act of adultery in his house with a clerk of his, a day or two before he sent her away. But there is no proof of the truth of this allegation, except his own testimony, and that is not corroborated, while, on the other hand, she and the alleged paramour both distinctly and explicitly swear that his statement on the subject is absolutely and unqualifiedly false. The defence must be held to have failed, and it follows, under the evidence, that he must be required to support his wife. The child is between five and six years of age. The evidence does not show that the complainant is an unfit person to have charge of it. It is now in the city of New York with one of the complainant's sisters, before mentioned, whom the defendant permitted to take it when he drove his wife away. In fact, the child lives with its mother. A careful consideration of the testimony leads me to the conclusion that, in view of the defendant's property and his income from it and his business, he is well able to furnish reasonable support for his wife and child. There will therefore be an order that he pay his wife \$10 a week for her support and maintenance and that of the child, and give security therefor, and that he pay the complainant's counsel a fee of \$100.

Soden v. Soden.

JAMES SODEN

v

JOHN D. SODEN et ux.

Where a fund was to be invested during the lifetime of a widow, and then to be paid over to a remainderman—*Held*, that a remainderman is, as to his share of the fund, to be regarded as a creditor as against whose claim therefor a voluntary conveyance of lands may be set aside, although made during the lifetime of the tenant for life.

Creditor's bill. On final hearing on pleadings and proofs.

Mr. D. A. Storer, for complainant.

THE CHANCELLOR.

This suit is brought to set aside as fraudulent as against the complainant's judgment, which is against the defendant John D. Soden, two deeds made in 1875, for the homestead farm of the latter, whereby (for a nominal consideration, according to the deeds) that property was transferred by him to his wife. The complainant's judgment was not recovered, however, until 1879. The claim on which it is based is for the complainant's share of the residue of the estate of William Soden, deceased. The money which constituted the residue was in the hands of the executors (of whom John D. Soden was one), in 1873. They were bound to invest it and keep it invested during the life of the testator's widow, who was entitled to the interest. There was, at the time the deeds were given, a liability on the part of the executors to pay the principal after her death. She died three or four years ago. A voluntary conveyance, by John D. Soden, of his property, would not be valid against this claim of the residuary legatees for the residuum. They are to be regarded as creditors, whose claims existed prior to and at the time of the making of the conveyances in question, which, as before stated, was in 1875.

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That these conveyances, which were a deed from the defendants to Garret Forman, and a deed from the latter and his wife to Mrs. Soden, were wholly voluntary, there is no room to doubt. They each purport to be made for the consideration of \$1. By the answer, the true consideration of the deeds is alleged to have been the relinquishing by Mrs. Soden (by joining in the deed for the property) of her inchoate dower in certain premises conveyed by her husband to Thomas Keyes, in 1869. By the proof the defendant set up another consideration also, money, which they say was from time to time earned by Mrs. Soden, and given over to her husband, and used by him, and which he promised to repay her. Without entering on the considerations appropriate to the merits of this defence, if it were allowable, it is enough to say that inasmuch as it is not set up in the answer, it cannot be considered. *Chandler v. Herrick*, 3 Stock. 497; *Mead v. Coombs*, 11 C. E. Gr. 173. As to the defence set up by the answer, the fact appears that the property conveyed to Keyes was encumbered beyond its value by mortgages, in which Mrs. Soden had joined. The consideration of the conveyance was the assumption, by Keyes, of the mortgages, but Soden was to pay him \$150, or thereabouts. Her inchoate dower, therefore, was of no value. Again, that conveyance was made six years before the transfer of the property in question. It does not appear that any consideration whatever was mentioned when the conveyances for that transfer were executed. Forman, who drew the deeds, says that all he knew about the object of the transfer was that it was to put the title in Mrs. Soden, and that the only consideration, so far as he knows, is that mentioned in the deeds; and he further says that neither Soden nor his wife has ever, at any time, or in any manner, stated to him, or in his presence, the object in making those deeds. Soden, in his testimony, says that he had agreed to convey the property to his wife in order to repay her the money she had advanced to him, and that in making the conveyance he had no other purpose except to secure the repayment of those moneys to her. There is not, and there never was, any written evidence of the alleged agreement to convey the property in consideration of the relinquishment of the

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inchoate dower. Mrs. Soden says that no one except herself and her husband was present when it was made. Mr. Keyes knows nothing of the existence of any objection on the part of Mrs. Soden to signing the deed to him. The transfer to her was not made, as before suggested, for six years after the alleged agreement, and it is most noteworthy that it was not made until a few days before the return-day of a rule upon Soden to show cause why he should not be attached for contempt for not accounting, pursuant to citation, for the residue which was in his hands. The rule was served on him on the 16th of January, and the transfer was made on the 20th. The rule required him to show cause on the 28th. The principle upon which the cases of *Post v. Stiger*, 2 Stew. Eq. 554, and *Clark v. Rosenkrans*, 4 Stew. Eq. 665, were decided, is applicable to and will govern the decision of this. There will be a decree for the complainant, accordingly.

THE NEW JERSEY AND NEW ENGLAND TELEGRAPH
COMPANY

v.

THE BOARD OF FIRE COMMISSIONERS OF JERSEY CITY.

1. Public agents can only bind the municipality which they represent when they act within the limits of their chartered authority.
 2. A municipal corporation may always interpose successfully the defence of *ultra vires* to a contract not within the scope of its chartered powers.
 3. If public agents concede privileges they must restrict the concession to such as may be given, without detriment to the public. This the party to whom the concession is made is bound to understand.
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On application for an injunction, heard on bill and affidavit, and depositions taken on notice.

N. J. and N. E. Telegraph Co. v. Fire Commissioners.

Mr. Flavel McGee, for motion.

Mr. Allen McDermott, contra.

VAN FLEET, V. C.

The complainants are the owners of a line of electric telegraph, extending from the city of New York to the city of Philadelphia. One of their wires is used for the transmission of messages between the stock exchanges of the two cities. The complainants aver that no telegraphic wire in the United States is of greater commercial importance than this one. The object of their bill is to prevent the defendants from destroying a part of their line.

The facts material to the question submitted for judgment may be summarized as follows: Prior to the erection of the complainants' line through Jersey City, the defendants had erected a telegraph in Jersey City, which they used for the purposes of their department. Some of their poles were out of repair, and required to be replaced by new ones. The complainants intended to construct a part of their line through the same streets in which the defendants' line had been constructed. The complainants do not say, in their bill, that they had obtained permission from the common council of Jersey City to erect their line through these streets. The complainants proposed to an officer of the defendants, known by the name of superintendent of telegraph, that they would remove such of the defendants' poles as were worn out, and put in their places poles large enough for the use of both parties, and would thereafter keep the poles in repair, replace them when worn out, and be charged, in all respects, with their care; and would also give the defendants the right to hang their wires on any other poles which they might erect in any other part of the city, on condition that they should have the right to hang their wires on the defendants' poles. The superintendent told the complainants that he had no authority to accept their proposal, but he promised them that he would report it to the proper committee of the defendants. It was not reported to the board, nor to any com-

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mittee of the board, but the superintendent reported it to two members of the board—first to the president of the board, who directed him to report it to Commissioner Speck, and he did so, accordingly. Commissioner Speck, after going over part of the route, directed the superintendent to accept the offer. The complainants, immediately after being informed of Commissioner Speck's direction, furnished the necessary men and material, and the old poles were removed and new ones erected, and the wires of both lines were hung upon them. The work was all done at the complainants' cost, but under the direction of defendants' superintendent. The complainants say their expenditure exceeded \$1,200.

At this point it is important to state that, while the board of fire commissioners consisted of six members, but a single member assented to the complainants' interference with their telegraph. Four of its members, so far as the bill shows, never heard of the complainants' proposition until after the work had been completed. It is certain the complainants' proposition was never laid before the board as a body. It is equally clear that the board could only act when duly convened as a body. It is, therefore, needless to say that the action of the complainants in removing the old poles and substituting new ones was wholly unauthorized.

The events just described all occurred before September 1st, 1880. On that date a permanent committee of the board, called the committee on telegraph and fuel, were directed to investigate the action of the complainants. The resolution giving this direction stated that the complainants had acted without authority. The next day (September 2d) the complainants wrote a letter to the defendants explaining their conduct, and on the 15th of the same month the board, in conformity to the recommendation of the committee having the matter in charge, invited the corporation attorney and the officers of the complainants to meet with them at their next meeting. That meeting was held September 22d, and the action of the board, in relation to the matter under consideration, is recorded on their minutes, as follows:

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"Commissioner Speck reported that the committee on telegraph and fuel recommended that the right and use of the poles erected by the New Jersey and New England Telegraph Company, touching our line, be transferred to the fire department, and in return this board will grant permission to the said New Jersey and New England Telegraph Company to place their wires thereon, provided there is no interference with the wires of this department. On motion, the reported was received and adopted, and the clerk was directed to notify the New Jersey and New England Telegraph Company."

A copy of this minute was sent to the complainants the next day (September 23d), and six days afterwards (September 29th) they wrote to the defendants, stating that while the terms of the agreement set forth in their communication were not as they understood them originally, yet they saw no good reason why they should not accept them, and they did thereby accept them. The next day (September 30th) the clerk of the defendants wrote to the complainants, stating that their letter of the 29th had been laid before the board, and that the board had directed him to say, in reply, that the board would not enter into a contract with the complainants until they were convinced that the complainants' wires would not interfere with the telephone wires of the department.

No further communication passed until October 20th, 1880, when the complainants were informed that the board, sitting as a committee of the whole, were of opinion that the use of the poles by the complainants would interfere with the working of the telephone of the department, and by the same communication they were notified that the committee on telegraph and fuel had been ordered to have the poles erected by the complainants removed, and the poles belonging to the department restored. Nothing further was done by either party until November 18th, 1880, when the defendants notified the complainants that unless the poles erected by them were removed at once, the department would take measures to have them removed. Thereupon the complainants asked this court to protect them against the consequences of the acts threatened by the defendants.

The complainants put their right to protection upon a contract. They contend that the defendants have made a contract with them, giving them the right to hang their wires on the 'defendants' line, while the defendants deny both the fact of the

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contract, and their capacity to make one of the character claimed. There can be no doubt that the injury threatened belongs to the class which it is the duty of this court to prevent *in limine*. If the complainants' wires are severed at a single point, it is obvious that their line, between its principal termini, will be rendered utterly useless. The mischief threatened will, if committed, occasion serious and irreparable loss. It is equally clear, that if the contract affirmed by the complainants is one which the defendants were not authorized to make, it is void. They are public agents, and can only bind the municipality which they represent when they act within the limits of their chartered authority. A municipal corporation may always interpose, successfully, the defence of *ultra vires* to a contract not within the scope of its chartered powers.

The complainants' right to an injunction must depend, I think, entirely upon whether or not they have shown a valid contract. The power of the defendants to make a contract I do not think can be the subject of much doubt. By the charter of Jersey City, they are given the entire control and management of the fire telegraph and other apparatus appertaining to the fire department (*P. L. of 1871 p. 1142, § 114*), and also power to purchase and hold any personal property they may deem necessary for the purpose of extinguishing fires. *Id. 1144 § 117*. These provisions, I think, give them power to repair and rebuild their line of telegraph. This necessarily involves authority to make contracts for material and labor. Whether they can lawfully agree to pay by a concession of privileges, which will confer upon some other person authority to erect telegraph poles in the streets, without the permission of the common council, is quite another question. I shall, however, for the purposes of this discussion, assume that the defendants have power to make such a contract as that which the complainants claim was made in this case.

The test, then, by which the complainants' claim must be tried, is, Have they shown a contract? The facts are free from dispute. The complainants cannot claim that they expended their money upon the faith of a promise. They had no promise

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from the defendants. Their acts in removing the defendants' poles and substituting their own were entirely unauthorized; they were, in fact, acts of unlawful interference. That they were done under the superintendence of one of the defendants' officers, does not at all change their legal character. He acted without authority, entirely outside of his powers, and his acts were, therefore, those of an unlawful intermeddler. The complainants are, in my opinion, without a particle of equity, unless it can be found in the action of the defendants on the 22d of September, 1880. On that date the defendants did inform the complainants that they would be willing, in a certain contingency, to make a contract with them. Their action, as I interpret it, amounted to this: They said to the complainants that, if the complainants would transfer to them the poles which they had erected, they would grant to the complainants the right to place their wires on them, provided the placing of their wires on them did not interfere with the efficiency of the telegraph for the uses of their department. This, in my opinion, was the only contract, for a joint use of their line, the defendants had any authority to make. They were public agents, charged with important public duties. Emergencies were possible, when the safety of the public would depend largely upon the celerity and thoroughness with which they performed their duties. They were given the control of the telegraph as a means to enable them to do their duty. All this the complainants knew. They also knew that the defendants could make no arrangement with them, or with any other person, by which they surrendered the control of the telegraph, or allowed it to be used for any purpose which might impair its efficiency as an arm of the public service; and that, if they should attempt to do so, even by a contract executed with the utmost solemnity, their act would be plainly *ultra vires*. When the complainants were informed what kind of a contract the defendants were willing to enter into, they at once assented to its terms, and this, the complainants insist, completed the contract, and from thenceforth both parties were bound by it. But is this true as a matter of fact? In other words, did the parties understand that the defendants, by their

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action of September 22d, meant to propose a contract which should have binding force from the moment the complainants assented to it? So far as the defendants are concerned, they give a conclusive answer to this question by their conduct. Immediately upon being informed by the complainants that they were willing to agree to the terms mentioned, the defendants notified them that they were not yet ready to conclude a contract, and would make none until they were satisfied that they could do so without impairing the efficiency of the telegraph for the public service. The complainants did not dissent; they said nothing. Their conduct, in this respect, is important, when we remember that the contract was entirely their project, and that they were so eager to make it that they actually proceeded to execute it before the defendants had commenced its negotiation. It must also be remembered that the complainants were endeavoring to induce the defendants to condone a trespass. The defendants were willing to grant condonation conditionally. They were willing to overlook the trespass and give the complainants the right to use the poles which they had erected, but only in the event such use did not, in their judgment, interfere with the use of the telegraph by the department. This the complainants were bound to understand from the language of the resolution.

But, aside from all other matters, I think the complainants were bound to understand, from the nature of the defendants' powers and duties, that the question whether the complainants' wires could be put upon the defendants' poles without danger of injury to the public service, was one that the defendants were bound to reserve for their own determination. They knew they were dealing with public officers who were charged with delicate and important duties, and that they had been given control of the telegraph for the protection of the public, and that they could neither use it themselves nor allow it to be used for any purpose which involved the slightest risk or hazard to the public. When, therefore, the defendants proposed to allow them to use their line, provided no interference occurred, they were bound to understand that the question whether the public safety would be imperiled by granting them what they wanted or not

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was one that the public welfare would not permit to be decided by experiment or trial, but must be left to the judgment of the defendants. That judgment having been exercised, it must be assumed that it has been fairly exercised. It finds that the complainants' wires, if maintained on the defendants' poles, will interfere with the working of the telephone of the department. Such finding is, in my judgment, conclusive against the complainants.

The order to show cause must be discharged, and the complainants' bill dismissed, with costs.

JOHN TRESCH

v.

JOHN M. WIRTZ and MINNIE WIRTZ.

1. By the common law, a husband had an absolute right to all moneys earned by his wife; but this rule has been abrogated in this state. *Rev. 637 § 4.*

2. Prior to this statute, a husband could make a valid gift or relinquishment to his wife of her earnings, even against creditors whose debts had already been contracted.

3. If a wife places money in her husband's hands, to be invested for her, and he accepts it with that understanding, he becomes her trustee, and is bound to execute his trust faithfully.

4. The marital relation does not disqualify a husband from becoming the agent of his wife.

Mr. E. D. Deacon, for complainant.

Mr. M. T. Newbold, for defendants.

VAN FLEET, V. C.

This is a creditor's suit. The defendants are husband and

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wife. The complainant having recovered a judgment against the husband, and being unable to find any property out of which he can make his debt, seeks by this suit to reach certain property standing in the name of his wife, which he says is, in law, the property of the husband, and should, therefore, be applied to the payment of his debts.

The facts are almost entirely free from dispute. They come mainly from the mouths of the defendants, and may be stated as follows: The wife, in the spring of 1868, commenced the business of hair-dressing and the manufacture of human hair, in Jersey City. She started with a capital of \$250. Part of this she borrowed, and the balance she had earned with her needle. Her husband at this time was engaged in the manufacture of hair jewelry, in the city of New York. He had no interest in his wife's business; he furnished none of her capital, and exercised no control over her in its prosecution, but allowed her to conduct herself in its prosecution as though she were a *feme sole*. She succeeded, and made money. In July, 1871, she gave her husband \$1,000 to loan for her on bond and mortgage. He made the loan, but allowed the papers to be made payable to himself. He now, however, says that the money belonged to his wife, and that the bond and mortgage were made payable to him through mistake. In January, 1874, \$500 of the principal of this mortgage was paid to the wife, and a new mortgage executed to her for the balance, and the old one canceled. Part, at least, of the complainant's debt had been incurred by the husband prior to this last date. The husband gave up his business in 1871, and after that, up to July 1873, assisted his wife more or less in her business. He was, however, a mere worker; the wife continued to control the business, and he merely gave her such labor as she required. She paid him no wages, but supported him, and gave him money as she thought he needed it. In July or August, 1873, he formed a copartnership with a man named Beltz, to carry on the business of florists. Beltz furnished no capital. Mrs. Wirtz really furnished the whole, by loans to her husband. The evidence renders it very clear that she advanced, by way of loan, between

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July, 1873, and January, 1874, over \$2,000. Both husband and wife swear that these loans were made upon a distinct understanding that they were to be repaid by a conveyance of the house and lot which the complainant now seeks to have declared the property of the husband. During the winter of 1873-74 the husband became satisfied that his copartner was defrauding him, and on the 16th of January, 1874, he sold his interest in the floral business for \$1,000, and a stipulation or promise by his purchaser that he would pay the husband's share of the copartnership debts. His purchaser paid neither the purchase-money nor any part of the debts of the copartnership. On the 7th of January, 1874, the husband conveyed the house and lot in dispute to a third person, and that person, on the 2d of February, 1874, conveyed them to the wife. Upon these facts the complainant asks a decree declaring that the mortgage and house and lot are held by the wife in trust for her husband's creditors, and adjudging that they shall be applied to the payment of his debts.

The evidence shows very clearly that the money loaned on the mortgage, as well as that invested by the husband in the floral business, was made by the wife. She acquired it chiefly by her labor and skill as a hair-dresser—her other gains being quite small—so that the money used for both purposes was her earnings, the product of her labor. The evidence, I think, makes it equally clear that she carried on business for her own benefit and advantage, with her husband's full consent, and that when she passed over the money to him, represented by the property in dispute, she had no intention to give it to him, nor to abandon it, nor he any purpose to obtain it, or to reduce it to possession in virtue of his marital rights.

Taking these to be the facts, the question presented by the case is one of law. The complainant contends that a wife's earnings belong to her husband, and that he cannot, as against his creditors, give them to her. There can be no doubt that, by the common law, a husband had an absolute right to all moneys earned by his wife; if he died without having recovered them, they did not survive to her, but went to his representatives. If

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it became necessary to sue for them during coverture, the husband had to sue alone, unless he could show a special promise to the wife, and then he might sue either in his own name, or in the names of both, as he chose. *Clancy on Husb. and Wife* 3, 5. But this rule of the common law has been abrogated in this state. By a recent statute, the wages and earnings of a married woman, acquired or gained by her in any employment, occupation or trade, carried on separately from her husband, are made her separate property, as though she were a single woman. *Rev. 637 § 4*. This statute does not, however, prescribe the rule by which the rights of the parties to this suit must be determined. It did not take effect until after the moneys in controversy had been earned, received and invested.

The question is, could a husband, prior to this statute, relinquish his common law right to the earnings of his wife so as to give her a valid title to them against his creditors? The complainant contends that he could not, and this contention is fully supported by a proposition affirmed as law in *Cramer v. Reford*, 2 C. E. Gr. 380. It is there said :

"A wife's earnings, and the avails of her labor, during coverture, belong to her husband, and he cannot, as against his creditors, give or agree to give them to her ; nor can she justly claim that property purchased with them, in her name, is hers, and not subject to be taken for his debts."

Two cases are cited in support of this proposition, namely, *Skillman v. Skillman*, 2 Beas. 403, and *Belford v. Crane*, 1 C. E. Gr. 265 ; but these cases, as I understand them, do not go quite to the length of declaring that a husband can, under no condition of facts, make a valid relinquishment of his right to his wife's earnings as against his creditors, but they do go to this extent—they hold that while a wife may acquire, by gift from her husband, a separate property, in equity, in her earnings, as against him, such gift will not be valid as against his creditors, unless made pursuant to an ante-nuptial contract. The creditors here meant are, obviously, those only whose debts were contracted prior to the gift or relinquishment. When free from debt, a husband may lawfully surrender his right to his

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wife's earnings, or make a valid gift to her of anything that is susceptible of ownership. The wife, in this case, had been carrying on business as a *feme sole*, with her husband's consent, for more than five years before the complainant's debt was incurred. The property the complainant is seeking to reach had been surrendered by his debtor long before the relation of creditor and debtor existed between them. The complainant did not trust the wife, nor look to her ability to earn money for the payment of his debt. If, at the time his debt was contracted, he knew his debtor had a wife, and made any inquiry respecting her, he undoubtedly was informed that she was carrying on business separately from her husband, and had loaned him the money with which he had started business. The gift in this case long ante-dated the complainant's claim, and was made when, so far as appears, the husband had no creditors, and did not expect to incur debts, and must, therefore, be held valid against the complainant.

But at the time the complainant's debt was contracted, a husband might make a valid gift or relinquishment to his wife of her earnings, even against creditors whose debts had already been contracted, though no ante-nuptial arrangement existed between them. In *Peterson v. Mulford*, 7 Vr. 489, decided by the court of errors and appeals at its March Term, 1873, that court declared it to be the settled law of this state, that a husband may permit his wife to labor for herself and appropriate to her own use the avails of her labor, and may give to her, or allow her to appropriate to her own use, the proceeds of her own labor when received by her, and that such permission or gift is good and valid as against his creditors, if such proceeds have not actually been reduced into his possession.

No part of the earnings represented by the property in controversy was ever reduced to possession by the husband. The fact that he invested \$1,000 of them, on a mortgage payable to himself, did not, under the circumstances stated, constitute a reduction to possession so as to make the security his and deprive the wife of it. By allowing her to establish a business and to manage and control it as her own separate affair, and to

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take and appropriate its proceeds as her separate property, he told her, in the most unmistakable manner, that he abandoned all right to her earnings and the proceeds of her business. While they remained in her possession they were hers absolutely, and he was powerless to get them from her. When she had accumulated sufficient to warrant her in making an investment, it was both natural and proper for her to go to him and ask him to do it for her. If she placed the money in his hands to be invested for her, and he accepted it with that understanding, he became her trustee, and was bound to execute his trust faithfully. If, after getting the money into his possession to invest for her, he should have attempted to deprive her of it by the exercise of his marital rights, his attempt would have been a fraud of the most offensive kind. Neither he, nor those who must trace their title through him, can found a right on a wrong of that character. But the husband did not invest the money in his own name for the purpose of asserting a claim to it, nor for the purpose of making the security his own. The investment in his name was a mistake, which, in equity, took nothing from the wife, and gave nothing to the husband. In what the husband did there was no intent to appropriate the money to himself, in virtue of his marital right, and without such intent there can be no reduction into possession so as to deprive the wife of her right. *1 Bish. on Mar. Wom. § 119.*

Nor does the fact that a husband assists his wife, by working for her, or managing her business, make her property liable for his debts. A married woman may allow her husband to manage her separate estate, without necessarily subjecting it, or the profits arising from his management, to the claims of his creditors. *Aldridge v. Muirhead, 11 Otto 399.* A man's creditors cannot compel him to work for them. A debtor is not the slave of his creditors. The marital relation does not disqualify a husband from becoming the agent of his wife. All the property of a married woman is now her separate estate; she holds it as a *feme sole*, and has a right to embark it in business. She may lawfully engage in any kind of trade or barter. If she engages in business, and actually furnishes the capital, so that the busi-

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ness is in fact and truth hers, she has a right to ask the aid of her husband, and he may give her his labor and skill without rendering her property liable to seizure for his debts. *Voorhes v. Bonesteel*, 16 Wall. 31.

The property the complainant seeks to reach is not the property of his debtor, and his bill must therefore be dismissed, with costs.

THE ELIZABETHTOWN SAVINGS INSTITUTION

v.

JAMES J. GERBER, as assignee of Simeon J. Ahern.

1. Judgments of courts of record in one state are entitled to recognition by the courts of sister states as evidence of a debt, but they have no extra-territorial force as judgments.

2. No court can enforce its process or orders beyond the limits of the state which ordained and established it.

On final hearing on bill, answer and proofs taken before a master.

Mr. Hamilton Wallis, for complainants.

Mr. William P. Wilson, for defendant.

NOTE.—The plaintiff in a judgment recovered in one state is only regarded as a creditor at large in another, *Carter v. Bennett*, 6 Fla. 214; and the rule applies in the administration of a decedent's assets, *Davis v. Smith*, 5 Ga. 274; *Brengle v. McClellan*, 7 Gill & Johns. 434; *Cameron v. Wurtz*, 4 McCord 278; *Harness v. Green*, 20 Mo. 316; *McElmoyle v. Cohen*, 13 Pet. 312; 2 Wms. on Exrs. *999.

Execution can issue only out of the court which renders the judgment or decree; thus it cannot issue out of the common pleas on a decree or order of a court of equity, *Stanford's case*, 4 Scott 23; *Gibbs v. Pike*, 9 M. & W. 351; nor out of the supreme court on an inferior court's judgment, *Clarke v. Miller*, 18 Barb. 269; nor run beyond the county where the court is organized, *People v. Van Epps*, 4 Wend. 387.

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VAN FLEET, V. C.

The object of the bill in this case is to enforce what the complainants call an equitable lien. The fund in dispute is in court.

The following are the material facts: In 1876, the Esterbrook Steel Pen Manufacturing Company brought a suit against Simeon J. Ahern in this court, for an account, which resulted in a decree in favor of Ahern for a sum slightly in excess of \$500. The sum so found due was, by the order of the court, paid to the clerk June 25th, 1878. Prior to this date, and on the 16th of April, 1878, Ahern was adjudged a bankrupt, and shortly afterwards the defendant, Gerber, was appointed his assignee. The complainants recovered a judgment against Ahern in the supreme court of the state of New York on the 29th of October, 1877, for over \$2,000, and on the 2d of March, 1878, they procured one of the justices of that court to make an order requiring the pen company to pay to them any debt which might be due from them to Ahern, up to the amount of their judgment, and also forbidding them from paying the same to Ahern, or to any one for him. At the time this order was made, as well as before, both Ahern and the pen company were citizens of this state. The pen company, however, had an office in the city of New York, where they conducted a part of their business.

The order just referred to, made by one of the justices of the supreme court of the state of New York, the complainants contend, created a lien in their favor upon the moneys in court, which they have a right to ask this court to enforce. This lien constitutes their sole right to relief. If they have no lien they have no case.

Query, whether an execution issuing out of one court on a judgment rendered in another, is amendable, *Simon v. Gurney*, 5 Taunt. 605; *Field v. Paulding*, 1 Hill. 187.

Execution cannot issue on a judgment recovered in a court which has been abolished, *Harris v. Cornell*, 80 Ill. 54; *Lee v. Newkirk*, 18 Ill. 550; see *Mathews v. Gilreath*, 11 Ired. 244; *Davis v. Bryan*, 7 Yerg. 88.

It may issue, notwithstanding the destruction of the judgment by casualty, *Strain v. Murphy*, 49 Mo. 337; *Chicago Dock Co. v. Kinzie*, 93 Ill. 415; *Faust v. Echols*, 4 Coldw. 397.

Inferior courts may be empowered by legislation to send executions beyond their territorial limits, *Hickman v. O'Neal*, 10 Cal. 292; *Lyon v. Fish*,

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The complainants are not judgment creditors. A judgment of a court of record of a sister state is entitled to such faith and credit here, as evidence of a debt, as it would have in the state where it was recovered, but it can have no force or effect here for the purpose of being enforced as a judicial sentence. The judgments of the courts of record of one state are entitled to recognition by the courts of sister states, but they have no extra-territorial force whatever as judgments. Properly authenticated, they afford conclusive evidence of a debt in external jurisdictions, in virtue of the constitutional provision entitling the public acts, records and judicial proceedings of each state to full faith and credit in every other state, but they possess no other virtue or efficacy. The order under consideration, construed in its most liberal sense, simply imposes a personal duty—the pen company is directed to pay, and Ahern is forbidden to receive—but no attempt is made to bind or charge the debt due from the pen company to Ahern.

But the fact which, I think, is utterly destructive of the complainants' theory, is this: The pen company was a corporation created by the laws of this state; its domicile was here, and this, in law, was the *situs* of its personal property, and, being here, such property could not be made subject to the process or orders of the courts of any external jurisdiction. Such courts can exercise no jurisdiction whatever over property located in this state. At this time Ahern was also a citizen of this state. Now, it would be absurd to say that, if an execution had been issued

20 Ohio 100; *People v. Barr*, 22 Ill. 241; *Seaton v. Hamilton*, 10 Iowa 394; *People v. Lott*, 21 Barb. 130; *Lillard v. Shannon*, 60 Mo. 522; as where one county is annexed to another after a recovery of judgment in the former, *Beebe v. Fridley*, 16 Minn. 518.

Execution may issue, notwithstanding a suit is pending on the judgment, *Cushing v. Arnold*, 9 Metc. 23; *Moor v. Towle*, 38 Me. 133; *Simpson v. Cochran*, 23 Iowa 81; or on a judgment after the recovery of another judgment thereon, *Howard v. Sheldon*, 11 Paige 558.

A creditor's bill may be filed on a judgment at law, after execution, notwithstanding the recovery of another judgment on the judgment, *Bates v. Lyons*, 7 Paige 85.

A foreign judgment, if enforced here, is payable in the currency of this country, *Swanson v. Cooke*, 45 Barb. 574; see *Stringer v. Coombs*, 63 Me. 160—**REP.**

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on this judgment, and a levy made by virtue of it, either by a New Jersey or a New York officer, upon Ahern's property in this state, that any lien would thereby have been created, or that such proceeding would, in the slightest degree, have affected his assignee's title to the property. Such process would have possessed no more force, as a legal instrument, in this state, than so much blank paper. Is it possible, according to legal principles, to give greater virtue or efficacy to this order? It is simply a substitute for process of execution. It takes the place of an execution, because the thing sought to be reached is not seizable by execution; but it emanates from the same source that an execution would, and can, in the nature of things, have no effect, as a legal process, beyond the limits of the state which created the court that made it. No court can enforce its process or orders beyond the limits of the state which ordained and established it. Even the judgments and decrees of the courts of one nation or state are entitled to no credit or respect in the courts of other nations or states, except in virtue of treaty obligations or constitutional provisions. The maxim in regard to process issued to enforce judgments in external jurisdictions is, *extra territorium jus dicenti impune non paretur*. The order upon which the complainants' case stands, in my judgment, created no lien in their favor.

But, if it had been possible to effect such a result by an order of this character, it is clear, I think, that the bill in this case does not state sufficient facts to entitle the complainants to the relief they ask. The mandate upon which their bill is founded, as the bill avers, is an order made by the supreme court of the state of New York in a case in which the present complainants were plaintiffs and Simeon J. Ahern was defendant, requiring the secretary and managing agent of the Esterbrook Steel Pen Manufacturing Company, as such officer, to pay to the complainants any debt which might be due from the pen company to Ahern, up to the amount of the complainants' judgment. It is needless to observe that an order, in that form, simply imposed a duty on the officer, and not on the corporation, and that it was impotent to transfer, or even to touch, any debt or obligation of the corporation to Ahern.

The complainant's bill must be dismissed, with costs.

Creveling v. Fritts.

HENRY CREVELING et al.

v.

JOSEPH A. FRITTS et al.

1. A trustee can, in no case, and under no circumstances, become the purchaser of the property he is entrusted to sell, so as to acquire a title which he can maintain against his *cestui que trust*.

2. No man can set aside the law by his deed or will. He may make any disposition of his property he sees fit, provided he does not attempt to contravene or overthrow the law.

3. A trustee can do nothing not authorized by the terms of his trust.

4. A trustee, after he has made an actual sale, in good faith, of the trust property to a third person, may afterwards purchase it of such person and acquire a good title to it.

5. If a sale is shown to have been fair and honest when made, and that no fraudulent purpose then existed, it cannot be overthrown by subsequent acts or purposes.

On final hearing on bill and answer, and proofs taken in open court.

Mr. John N. Voorhees, for complainants.

Mr. John T. Bird, for defendants.

VAN FLEET, V. C.

The main object of this suit is to set aside the titles of four persons who claim to hold parts of the lands of which Joseph Fritts died seized, under deeds made in pursuance of authority given by his will. Mr. Fritts died in March, 1879. The beneficiaries under his will are his widow, his six children, and four grandchildren, the children of a deceased daughter. By his will, he directed that all his estate, both real and personal, be disposed of as soon after his decease as his executors should judge for the

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best interest of his estate, either at public or private sale, as they, or a majority of them, might think best. For his widow he made provision in these words:

"I will and bequeath to her, during her natural life, the interest of \$7,000, in lieu of her dower, to be secured on first bond and mortgage, in her name, she to hold the bond and mortgage on the farm where my son Emanuel now lives, commonly called the old Shurts farm."

His will then directs:

"If the above-described farm should be bought by any of my children, my wife is to receive six per cent. interest, and she to pay the annual taxes that may be assessed on said \$7,000; but if said farm is sold to a stranger, my wife to receive legal interest thereon."

The residuum of his estate is given to his four sons and three daughters. One of his daughters having died in his lifetime, her four children succeeded to her rights under the will. His four sons, Joseph, Stires, Emanuel and Oliver, were appointed executors, and all proved the will and entered upon the discharge of their duties.

The parties prosecuting this suit are the four grandchildren, and the persons holding the titles sought to be invalidated are three of the executors, namely, Stires, Emanuel and Oliver, and the fourth is Mrs. Margaret Fritts, the wife of one of the executors. The portions of testator's land held by each may be described as follows: Oliver has the homestead farm; Emanuel the old Shurts farm, the one upon which the \$7,000 set apart for the use of the widow was to be invested; Stires has the storehouse property and a wood-lot; and his wife, Mrs. Margaret Fritts, the flax-mill property.

The ground upon which the court is asked to nullify these titles is that each of the executors has procured a part of the real estate he was authorized to sell for the benefit of others, as well as himself, to be sold to himself for less than its fair value. In other words, being agents to sell the testator's lands for the benefit and advantage of others beside themselves, they have sold it to themselves, for less than its fair value, and thus, though the testator directed by his will that an equal distribution of his prop-

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erty should be made among all the children, these, by a betrayal of the trust committed to them by their father, have obtained more than their fair share.

If it be true that these executors have sold any portion of the testator's real estate to themselves—whether they did it openly and directly, or secretly and clandestinely, by any sort of evasion or artifice—it is clear that the law will not permit them to hold it, even though it may appear they have paid more for it than it was fairly worth. The law upon this subject is settled. A trustee, whether he be called an executor, administrator, or by any other name, can, in no case, and under no circumstance, become the purchaser of the property he is entrusted to sell, so as to acquire a title which he can maintain against his *cestui que trust*. The ground upon which this disqualification of the trustee rests is no other than that principle which declares that the same person cannot be both judge and party. 2 *Sug. on Vend.* 888. A trustee to sell is always charged with the duty of deciding several important questions—as, for example, When is the best time to sell? What steps are necessary to be taken to secure an advantageous sale? And what is a fair price for the thing to be sold? Now, if he is permitted to bring to the decision of these questions the self-interest and bias of a purchaser, is it likely that the interests of the *cestui que trust* will be as carefully considered and as sedulously protected as if he stands stripped of all bias which can in any way antagonize the interests of his *cestui que trust*? The law declares that human nature is too weak and selfish to permit even the best of men to be judges in their own causes, and it therefore says that he that is entrusted with the interest of others cannot be allowed to make the business an object of interest to himself; because, from the frailty of nature, one who has the power will be too readily seized with the inclination to use the opportunity for serving his own interest at the expense of those for whom he is entrusted. He who undertakes to act for another in any matter, cannot, in the same matter, act for himself.

The situation of the trustee gives him an opportunity of knowing the value of the property, and also the necessities and straits of the *cestui que trust*, and as he acquires that knowledge at the

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expense of the *cestui que trust*, the law requires him to use it for the benefit of the *cestui que trust*, and not to his harm.

The rule is now universal, that, no matter how fair the purchase by a trustee may be, nor how ample the consideration he pays, the *cestui que trust* is at liberty in every case to set the sale aside. Because, if a trustee were permitted to buy in an honest case, he might likewise buy in a case having that appearance, but which, from the infirmity of human testimony, might be grossly otherwise. Thus, a trustee for the sale of land may, by the knowledge he acquires in the performance of his duty, ascertain that the land has an extraordinary latent value; as, for example, that it contains a deposit of valuable minerals, or some other hidden treasure, and, locking up that knowledge in his own breast, he might purchase the land for what might seem a fabulous price, and yet get it for a mere tithe of its real value. Now, in such case, if the trustee should choose to deny the fact of knowledge, how would it be possible to establish it against him? *Levin on Trusts* 439, 461, 462. I think it may be regarded as unquestionably true that a trustee who would enter upon the accomplishment of such a scheme, would be equal to the task of concealing the real motive which induced him to purchase. Adequate protection can only be given to the *cestui que trust* by elevating the trustee to a region where temptation never comes, and if he descends, to take from him whatever of the trust property may be found in his grasp which he cannot show, by satisfactory proof, that he obtained without any violation of the great principles which should govern his conduct.

The rule upon this subject is a wise public regulation, intended to protect a species of property which otherwise would be constantly exposed to peculiar hazard. All persons occupying the position of trustee are bound to submit to it. If they violate it, no matter how pure their intention may be, their act is voidable. However innocent the purchase may be in a given case, it is poisonous in its consequences. In all such cases, then, the trustee is forbidden to purchase, because his interest as such purchaser is opposed to the interest of his *cestui que trust*, and he acts, therefore, under a bias in his own favor. Nor, to speak in

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the words of Chief-Justice Beasley, does this rule rest, to any considerable extent, in the fact that in a particular line of cases the trustee has peculiar opportunities for the practice of fraudulent acts with regard to the property in his charge. The rule, to be efficacious, must be general, and the law implies, therefore, that in all cases of trusts such opportunities may exist, and consequently the prohibition is universal. So jealous is the law upon this point, that a trustee may not put himself in a position in which to be honest must be a strain upon him. The general rule, therefore, applies, not merely in those cases in which the confidence is absolutely betrayed, but also when the circumstances are such that there was a temptation to violate it. *Staats v. Bergen*, 2 C. E. Gr. 558.

When an executor or administrator consents to accept an appointment which imposes upon him the duty of making a sale of land, his acceptance constitutes a pledge that he will give to the performance of his duty his best skill, judgment and capacity. His position is one of high confidence where, for the security of the rights of those whose interests have been committed to his care, the law requires him not only to subordinate his interests to theirs, but to keep himself free from even a temptation to betray them. This is the measure of fidelity the law prescribes, and this is the measure of duty the court is bound to exact.

The test question, then, of the case is, Is it true that these executors sold the several parts of the testator's lands which they now hold, to themselves? That they made contracts, each with the others, to purchase for substantially the same prices that they ultimately paid, is an admitted fact. The lands in dispute were offered at public sale November 1st, 1879, but not sold. About a week prior to the day they were offered, Stires, Emanuel and Oliver had a meeting, at which Joseph, the other executor, was not present, and they then agreed upon the prices they would severally pay. This seems to have been a secret meeting, for Stires swears that they agreed they would tell no one what they had done. He says they did not tell Joseph, because they did not think it concerned him. At this meeting it was agreed that Stires should pay \$2,000 for the flax-mill property; it was after-

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wards conveyed to his wife for \$2,005. Emanuel was to pay \$6,500 for the old Shurts farm, and he afterwards got it for that sum. Oliver was to pay \$9,000 for the homestead farm, and he afterwards got the title he now holds for \$9,005.

Prior to the time this meeting was held, the executors had been informed by their counsel that they could purchase neither directly nor indirectly at their own sale, nor of themselves, so as to acquire a title which the legatees could not impeach. From the high character for learning and caution of the gentleman who acted as the legal adviser of the executors, the court is justified in believing that they were not only instructed as to the legal rule upon this subject, but also fully informed in respect to the reasons of policy and justice upon which it rests. If they were so informed, is it possible to ascribe a legitimate purpose to this secret meeting? None of the lands of the testator had then been exposed to sale; they were advertised for sale, but the executors could not know how great the demand would be for them, nor what prices they would command. They must have known that they could not appear at the sale as competitors for them, without chilling the sale; they knew that they could not even express a desire to purchase them, without exerting an unfavorable influence upon the sale. They were the lands of their father, and if it were known that they desired to buy, their neighbors and friends would be strongly disinclined to put themselves in competition with them. But more; they were the vendors and were in possession of the lands, and knew all about them, their good points and their bad, and, other things being equal, could form a better judgment as to their value than any other person. Hence, getting together before the sale, and agreeing upon prices that they thought they could afford to pay, necessarily tended strongly to make themselves the purchasers. That would, in most cases, be the inevitable effect of such a proceeding if the prices fixed by them were made known to other persons desiring to purchase. They were undoubtedly bound, in the proper discharge of their duty, to get together, either before or at the sale, and agree upon prices for which they would sell, but they were bound to come to the discharge of

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that duty free from the bias of any interest or motive which would tempt them to undervalue the property. They were bound to go to the discharge of that duty with the same desire, so far as it is possible for one person to take on himself the rights and interests of another, to get the highest possible price, that they would do if the lands were their own.

One of the most inflexible requirements of the law concerning trustees is, that the trustee shall do for his *cestui que trust*, in the management of the trust property, precisely what he would do for himself if he were its owner in his own right.

As already stated, none of the lands in question were sold on the day they were advertised for sale, but the sale was adjourned to a future day. Two of the executors bid on the tracts they subsequently purchased, but not the full sums they had agreed among themselves to pay. The four executors and their two sisters afterwards met, on the 12th of November, 1879, and it was then agreed that the three executors should be permitted to purchase, for the prices they had agreed upon among themselves before the sale. Joseph assented to this arrangement, but with great reluctance. He thought each of the several parcels was worth more than his brothers were willing to give, and he told them that he believed they could be sold for more at a fair sale, and named the sums. He thought the flax-mill property was cheap at \$2,500 ; that the old Shurts farm ought to bring \$7,000, and he thought he knew a man who would give considerably more than Oliver offered for the homestead farm. His brothers adhered to the prices they had previously agreed upon among themselves, and said they would give no more.

It requires no argument to show that the three executors had, by their negotiations, placed themselves in a position where their individual interests strongly antagonized the interests of their *cestuis que trust*, and where it was impossible for them to be faithful to their duty without sacrificing their own interests. On the day of sale, Joseph requested them to offer the storehouse property as a separate parcel, and they were advised by the auctioneer to adopt that course, but refused to do so. When Joseph told them that he thought he knew a person who would

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give more for the homestead farm than Oliver had offered, the announcement was received with strong disfavor; he was told to produce his man, and one of the executors says he thought it was a trumped-up story. Would this information have been received so distrustfully, and with such manifest disfavor, if the executors had all been zealously trying to sell this farm for the highest possible price? Again, some time after the meeting on the 12th of November, 1879, Joseph inquired of Oliver whether, if he found a purchaser for the homestead farm for a price greater than he had offered to give, he would surrender the farm on the 1st of April following, and Oliver replied that he would not, unless he was paid damages. I think it is impossible to scan the conduct of the three executors, even with a favorable eye, without seeing very clearly that they had a very strong desire to become the owners of the lands in controversy at prices which they had fixed before the sale as reasonable and fair, and that they regarded any project looking towards the sale of them to others, for greater prices, as unfriendly to them.

The deed to Emanuel for the old Shurts farm, it is admitted, was made in execution of the arrangement entered into on the 12th of November, 1879, and that he holds title under a contract in which he appeared both as vendor and purchaser. But for a provision of the will, it is admitted that his title could not stand. The provision referred to is the one in which the testator says that if the old Shurts farm should be bought by any of his children, then his widow shall receive six per cent. interest on the \$7,000 to be invested thereon, but if the farm is sold to a stranger she shall then receive legal interest. This, it is contended, fairly construed, is an authorization to any of the testator's children, including his four executors, to purchase this farm. I think this construction is correct. It is true no express authority is given, but the implication in that direction is quite as strong as any express words could make it. This much is made clear: that the testator intended, if a child bought, he or she should hold the farm subject to a lighter annual burden than it should be required to bear if it was held by a stranger. There is no mistaking his meaning in this regard; he intended that a

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distinction should be made in favor of all his children, whether they were executors or not, as purchasers of this farm, and, unless this clause is so construed, the interpretation put upon it must undeniably contravene the plainly expressed intent of the testator.

But this branch of the case presents a question of much greater gravity. Is this provision, so far as it authorizes the executors to purchase, valid? The law gives every citizen full dominion over his property. He may do with it whatever to him may seem fit, provided his disposition of it is made pursuant to legal methods, and not in contravention of the law. That part of the will just referred to is not a devise or gift; the testator does not say, either of my children may take the old Shurts farm, on condition that he or she pays into my estate a certain sum of money. His direction in that regard is that his executors shall sell it, either at public or private sale, as *they may deem best, when they judge it will be best for his estate*. The proceeds are to be equally divided among all his children. There can be no doubt about what was his fundamental purpose in respect to this farm—he intended that it should be sold for the highest possible price for the benefit of all his children. His love was the same for each, and he thought each had an equal claim upon his bounty. He certainly did not intend that the authority of the executors to buy should be so used as to defeat the main object of his testamentary scheme.

Now, the law says a trustee to sell shall in no case and in no crisis be permitted to become the purchaser of the property he is authorized to sell. It is true that this rule is not prescribed by a statute, but it is rooted in justice and sound policy, and stands prominent among those great doctrines of the law which have received the approval of the general judgment of mankind as being indispensable to the promotion of honesty and fair dealing. It, therefore, has all the force which a legal rule can have. It is unnecessary to remark that no man can set aside the law by his deed or will. He may make any disposition of his property he sees fit, provided he does not attempt to contravene or overthrow the law.

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Chancellor Vroom, in deciding *Fennimore v. Fennimore*, 2 Gr. Ch. 292, incidentally remarked that when a testator authorized his executors to purchase his real estate at public sale, and directed that a deed should be made to the purchaser by the other executor, either was at liberty to purchase, and the other was bound to carry the sale into effect by executing a conveyance to him.

It cannot be doubted that in case a trustee purchases at his own sale and conveys to a third person, and has that person to make a conveyance to himself, that his title is not void, but merely voidable. Until impeached by the *cestui que trust*, by suit, it stands as valid. In *Fennimore v. Fennimore*, no attempt was made to impeach or question the title of the trustee; but, on the contrary, the complainant in that case rested his right to relief on the fact that the trustees held the lands by a valid title. The main purpose of his suit was to hold one executor, who had conveyed to the other, liable for the purchase-money the other had agreed to pay. Of course, if he had charged that no title to the lands had passed, or had insisted that the title made should be annulled, he could have made no claim for purchase-money; he could not have both the land and its value, too. It was only on an admission that a valid title to the lands had passed, that he could lay any claim that anybody was liable for its purchase-money. The *cestui que trust* in that case did what persons occupying that position may do in every case, namely, treat the title made to the trustee as valid, and hold him liable for the purchase-money. It is obvious, then, that the question presented for judgment here was not before Chancellor Vroom, but, on the contrary, the legal rule invoked by the complainants in this case was expressly waived by the person seeking relief in that case, in order that he might hold the trustee for the purchase-money. He admitted the validity of the trustees' title to the land, in order that he might make him pay for it. The remark, therefore, of Chancellor Vroom, so far as the case under consideration is concerned, is without force or pertinency, and cannot be regarded as an authority in point except by a plain misapplication of legal rules.

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But suppose it be conceded that a testator may set aside the law by his will, and that he may confer authority upon a trustee to sell, to purchase the trust property, then the question will arise, has the trustee, in this case, acquired title in conformity to the terms of the trust? A trustee can do nothing not authorized by the terms of his trust. The instrument which brings him into existence as a trustee, usually defines his powers and prescribes his duties. The will, in this case, first directs that \$7,000 shall be invested on the old Shurts farm for the benefit of testator's widow. He doubtless intended not only to make a sufficient provision for her, but to provide a security which would be safe in any contingency. So careful was he upon this point, that he expressly directs that the mortgage to be taken shall be a first lien, that it shall be made to the widow in her own name, and that she shall hold it. These provisions show that this portion of his testamentary scheme had been the subject of careful, anxious and deliberate consideration. His will bears date October 28th, 1872, and remained unaltered up to the time of his death in March, 1879. It is a matter of common knowledge that, in the *interim*, a financial revolution swept over this country, which diminished the value of almost all kinds of property from one-fourth to one-half. The authority given to the executors to sell this farm is coupled with the privilege that they may buy, and if they do, they shall not be required to pay the full legal rate of interest, but may pay interest on the \$7,000, directed to be invested thereon, at the rate of six per cent. His direction to invest \$7,000 on this farm is explicit. Equally so is his meaning that the child that purchases shall have the right to pay less than legal rate of interest; but he must pay interest on \$7,000, not on a less sum. Now, what does this indicate? Not, of course, that the executors should invest \$7,000 on a farm that was worth only \$6,500; but it shows very plainly that when the testator gave his executors authority to purchase, he believed the farm to be worth a sum sufficient to make an investment of \$7,000 on it perfectly safe, and that he intended, if either of them purchased, a price should be paid which would render an investment of that sum

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on the farm secure against any contingency. According to my interpretation of this clause of the will, the authority given to the executors to purchase is limited by a clear indication of the price they should pay, and that the testator did not intend that they should exercise the right to buy unless a price was paid which would make an investment of \$7,000 on the farm perfectly safe.

Oliver holds the title to the homestead farm. On his behalf it is claimed that he stands in the right of a *bona fide* purchase, made by Mr. Jacob Cregar, after the arrangement made on the 12th of November, 1879, had been abandoned. Stated more precisely, the defence is this: that Oliver, sometime in March, 1880, threw up his contract for the purchase of this farm; that subsequently the executors made a contract to sell the farm to Mr. Jacob Cregar, who purchased with no design to convey to Oliver, but for his own benefit, and then, by a subsequent contract, entered into after his bargain with the executors was fully concluded, agreed to convey it to Oliver. The pith of the defence, it will be observed, is, that between the point where title left the executors and the point where it became fixed in Oliver, there was an honest purchase of this farm, by a third person, made for his own benefit, with no intent to convey it to Oliver, or to assist the executors in evading the law. There can be no doubt, that, if an honest purchase stands between these two points, Oliver's title is entitled to the protection of the law, and cannot be overthrown. But it is equally clear that, if Mr. Cregar's purchase was a wholly simulated proceeding, gotten up simply to conceal the real transaction, and appears to have been used merely to give the transfer of title from the executors to Oliver the gloss of truthfulness, then it is the duty of the court to declare his title worthless. I entirely agree with the counsel for the defendant, that a sale must stand or fall by what existed at the time it was made. If it is shown to have been fair, honest and just when made, that no unlawful act was then done, and no fraudulent intent then existed, it cannot be overthrown by subsequent fraudulent acts or intents.

Now what are the facts? The question addressed to the

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court is one that always requires cautious, but fearless examination. Did Mr. Cregar make his contract for the purpose of conveying the farm to Oliver, and did Oliver consent to the sale because he believed that the purchase was made for him? No previous agreement or arrangement, effected by words, need be shown. The question is not, what did these parties openly agree to, but what did they mutually understand and intend? What mutual purpose existed in their minds? The court is bound to examine this matter in the light of ordinary experience, and with discernment enough to see whether it is a case where the words of the parties say one thing and their conduct says quite another. There are a few admitted facts bearing on this branch of the case, which, in my judgment, furnish important hints as to the direction in which search should be made for the truth. Oliver, Stires and Emanuel all desired to possess themselves of certain parts of their father's lands, and they made contracts for their purchase at prices agreed upon among themselves, after they had been advised by their counsel that they could not purchase with safety. Oliver and Stires afterwards made a further arrangement, by which a part of the lands, that it was expected Oliver would get, was to be conveyed by him to Stires. Now, it is said, that the contracts made by Oliver and Stires with the executors were subsequently abandoned, as well as the arrangement made by Oliver and Stires for the division of the lands to be conveyed to Oliver, and that they gave up all expectation of getting the lands; yet, it so turns out, by a train of fortuitous events, that they get the lands at the very time they were entitled to them under their contracts with the executors, and for substantially the same prices that they had agreed to pay the executors, but by means of independent contracts made by third persons with the executors. Such a train of extraordinary coincidences may sometimes occur in the ordinary affairs of life, but so rare are the instances that they are almost entitled to be regarded as miracles.

The facts connected with Mr. Cregar's purchase and his sale to Oliver are thus narrated by himself: He happened at Oliver's on the 30th of March, 1880. Oliver is his son-in-law. Stires

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and Emanuel also happened to be there. Stires told Mr. Cregar that Oliver had thrown up his contract; he purposely refrained from asking why Oliver had done so, because, he says, he did not want to know, or to be mixed up in the matter. Stires then proposed to sell the farm to him. He says he had never thought anything about purchasing until this offer was made. He asked Stires what he wanted for it, and Stires replied, all he could get. He then offered \$9,000, and Stires asked him to give \$10 more, and he offered \$5. At this point Oliver remarked that he didn't know that they could do any better, and thereupon the bargain was concluded. It was agreed that the deed should be delivered the next day, and the purchase-money paid. By the terms of the contract he was required to pay, in cash, a trifle over \$5,100. The next day the executors and Mr. Cregar met in the village of Clinton for the purpose of performing the contract. Mr. Cregar met Oliver in the street, and he says he said to Oliver, "I am going to sell you this farm for the same that I gave, if you want it," and he says Oliver replied, "I will take it." A deed was then made by the executors to Mr. Cregar, and he at once conveyed to Oliver. Oliver paid the whole of the purchase-money to the executors. Mr. Cregar did not, in the whole transaction, pay out a penny of his own money.

Now, in the light of these facts, is it possible for any discerning mind to believe that Mr. Cregar's contract was made for his own benefit, with no intention in his mind at the time he made it of conveying the farm to Oliver, and that Oliver consented to the sale, with no expectation that the farm was to be conveyed to him? Do prudent men purchase valuable farms, at full prices, at the very commencement of the farming year? By his contract he was to pay \$5,100 the next day. Before he met Oliver the next day, had he made the least effort to raise this money? If he had the money already in hand, and purchased the farm for the purpose of providing an investment, how did it happen that, when he came to offer to sell the farm to Oliver, he did not propose, as one of the conditions of the sale, that Oliver should borrow his \$5,000? When told that Oliver had thrown up his contract, he says he designedly refrained from

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making any inquiry why he had done so, and yet it appears that he at once entered upon the negotiation of a contract to purchase the farm. Now, if there had been no previous understanding between him and Oliver, would not the thought have naturally suggested itself to his mind that it was possible Oliver had discovered a flaw in the title of the farm, or that he had changed his mind as to its value, and would he not, in consequence, have been so curious to know the reasons which influenced Oliver's conduct, that he would have disregarded any mere considerations of taste or delicacy, and declined all negotiation until he knew? It must also be remembered that the proposal to sell was made at a very unfavorable time for the vendor. It rarely happens that a valuable farm is sold for its full value at the very opening of the farming season. Besides, Mr. Cregar says he had never previously given the purchase of this farm a thought. Had he been bargaining for himself, can it be believed that he would not have availed himself of all the advantages of the situation, or that he would have concluded a contract before he knew why Oliver had thrown up his contract, or without giving the question whether he should purchase or not much more mature consideration than he seems to have done? But there is another fact in this transaction which, in my judgment, serves to dispel all doubt about its real character. Joseph, it will be remembered, applied to Oliver, some time after the 12th of November, 1879, to ascertain whether, if he could find a purchaser who would give more for the farm than Oliver had offered, Oliver would yield up possession on the 1st of April following, and that Oliver told him he would not, unless he was compensated for the damages he would sustain by the surrender. Now, when it is proposed to sell to Mr. Cregar, although they stand at the very threshold of the 1st of April, Oliver says nothing about damages, and nothing about being permitted to remain in possession until after the contract is concluded. I regard it as incredible that he would have allowed a contract for the sale of the farm to be fully consummated without making the least effort to ascertain whether or not he would be permitted to remain in possession, if he had not fully understood that

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the contract was really made for him. Whatever may have been the words uttered by these parties on this occasion, there can be no doubt respecting the thoughts and purposes of their hearts. They may have attempted to hide their real designs by a scrupulous silence respecting them ; but, looking at their conduct, scrutinizing what they did, and judging of it in the light of ordinary experience, nothing, as it seems to me, can be made more certain in human affairs than that all parties to this transaction perfectly understood that Mr. Cregar's contract was made for Oliver, and that they were going through the ceremony of making a contract with Mr. Cregar in order to give the transfer of title to Oliver the appearance of regularity.

The facts connected with the conveyance of the flax-mill property to Mrs. Margaret Fritts are too nearly identical, in all their material aspects, with those just reviewed, to make a separate discussion of them either necessary or desirable. Though Mrs. Fritts went through the ceremony of making a contract for the purchase of this property, when the contract came to be performed her husband appeared as the purchaser in fact. Of the \$2,005 purchase-money, he paid \$1,915. The balance was paid, it is said, with money which the husband had given to his wife. Besides, I am fully convinced that this property was conveyed to Mrs. Fritts for less than its fair value. Mr. David McClougham, whose position in this controversy entitles his judgment on this point to great weight, says that this property was fairly worth \$2,500. A trustee cannot sell the trust property to himself. As the law now stands, a sale by him to his wife may not be precisely equivalent to a sale to himself, but in a case where it appears that he paid the whole of the purchase-money, and afterwards treated the property as his own, and has had the whole beneficial use of it, there is so little distinction between that and a sale to himself, except in mere matters of form, that if such a transaction were held to be valid, the rule prohibiting a trustee from purchasing the property he is authorized to sell might, for all useful purposes, be regarded as abolished.

My conclusion is that the complainants are entitled to a de-

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cree setting aside all the deeds. The decree will be made upon the usual terms; the purchase-money paid must be returned, and the defendants must account for rents and profits. The complainants are entitled to costs.

THE EXECUTORS OF WILLIAM B. HILL, deceased,

v.

EDWARD DAY et al.

1. An inquisition *de lunatico inquirendo* simply makes a *prima facie* case.
 2. Where there is no reason to suspect fraud, the test, in cases where mental incapacity is charged, is, Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting?
 3. A principal's insanity revokes the authority of his agent, except in cases where a consideration has previously been advanced, so that the power has become coupled with an interest; or where a consideration of value is given by a third person trusting to an apparent authority and in ignorance of the principal's incapacity.
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On final hearing on bill, answer and proofs taken before a master.

Mr. Amzi C. McLean, for complainants.

Mr. William H. Vredenburg, for defendants.

VAN FLEET, V. C.

The complainants seek by this suit to have an assignment of a bond and mortgage, made by their testator, set aside, on the ground of mental incapacity. The assignment was made February 5th, 1878, and William B. Hill, the assignor, was, on the 7th of July, 1879, declared, by an inquisition duly taken, to be

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a lunatic, and to have been in the same condition of mental unsoundness for a period of two years antecedent thereto, but with lucid intervals. The inquisition simply makes a *prima facie* case. As against the defendants, it was purely an *ex parte* proceeding, and as to them it is not conclusive even as to the point of time when taken; much less can it have that effect against them for the retrospective period of two years.

The mortgage which is the subject of this controversy was made by Edward Day and wife to Theodore F. Purden, about the 1st of April, 1871, and was assigned by Mr. Purden to Mr. Hill August 1st, 1874. There is evidence tending to show that Mr. Hill, at the time the assignment was executed to him, offered to cancel the mortgage as a gift to Mrs. Day, and that he subsequently refused to receive \$100, which Edward Day offered to pay on it. It seems to be undisputed that Mr. Hill felt a warm friendship for Mrs. Day, and that she was strongly attached to him. Prior to the date of this assignment, Mr. Hill was in the habit of lending Edward Day his credit by endorsing notes for him. Edward Day swears that on one occasion Mr. Hill said to him that if he could, at any time, use the mortgage in question, he could have it by sending for it, as he had always intended to give it to Mrs. Day. On the occasion when the assignment in dispute was made, Edward Day did not go to Mr. Hill himself. He sent his son Charles, a lad then about nineteen years of age. Charles says he told Mr. Hill that his father had sent him there to say that Mr. Hill had offered his father the mortgage whenever he needed it, and that his father was now willing to accept it, and had sent him there for it. Charles further says that Mr. Hill then called Mrs. Hill, and requested her to get his box containing his papers. Mrs. Hill admits that she got the box containing her husband's securities, and unlocked it, and gave it to young Day. An adopted daughter of Mr. Hill says that after the box was given to young Day she saw him writing, but did not see what he was writing, nor does it appear that either she or Mrs. Hill made any inquiry upon that subject. The assignment was written by young Day on the mortgage itself, and was then signed by Mr. Hill, and young Day took the

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papers away with him. The assignment was not made to Edward Day, but to his daughter Anna. Both Mrs. Hill and her adopted daughter swear that they believed Mr. Hill, at this time, to be wholly unfit to transact business of any kind. The adopted daughter says that the next day she discovered that the mortgage in question was not in Mr. Hill's box, and so informed her mother. Some time afterwards Mr. and Mrs. Hill went to Tom's River, and after having a talk with some persons at the clerk's office, Mr. Hill determined to demand the return of the mortgage, and authorized his counsel, by writing, to demand its return. When Edward Day was notified that Mr. Hill desired the return of the mortgage, he said, at once, it should be returned. He further stated that soon after getting the mortgage, he had taken it to Philadelphia to have it examined, with a view of pledging it as security for a stock of goods he expected to purchase, but he would go and get it and return it to Mr. Hill. He further says he did get it, and on the 4th of March, 1878, took it to Mr. Hill's residence and offered to return it to him.

As the occurrences of this interview constitute, in my judgment, the pivot on which this case turns, it is necessary that they should be stated in detail. Edward Day is the only witness that describes them. He says:

"I got there about eleven o'clock in the morning; I saw Mr. and Mrs. Hill; they were in the house; I went in, and after inquiring about the health of the family, I stated the object of my visit; I told him there had been considerable talk about the mortgage, but I had got it and brought it back; I then took it from my overcoat pocket—the papers were in a large envelope—and took out each one and laid them on the table, and thanked Mr. Hill for his many acts of kindness, and proposed that he should take the papers back; Mr. Hill replied that the mortgage was just where he had always intended it should be; that it was all right until he got to the clerk's office at Tom's River, and there he was induced to try to get it back; Mrs. Hill acquiesced in what was said; a general conversation then ensued as to the prospect of my being able to make the trade for the stock of goods I had before spoken of; I then stated, as I had stated before, that if I could accomplish the trade and use both mortgages—this one, and the one in New York—I would make money enough to pay Mr. Hill every dollar he had paid for me; Mr. Hill then stated he was willing I should retain the mortgage, and he hoped it would be of use to me. I then said if that was the case, was it not best that he should give me a paper showing that his counsel was not to demand the return

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of the mortgage, and he replied, 'Yes;' Mrs. Hill then got paper, pen and ink, and I wrote this note, viz.: 'Point Pleasant, Ocean county, N. J., March 4th, 1878. I. W. Carmichael, Esq.: This is to authorize you not to demand of Edward Day any papers now in the possession of Edward Day, and for which I gave you a written order.' I read this paper to Mr. and Mrs. Hill, and Mrs. Hill suggested putting in the date of the note they had given to Mr. Carmichael; I did not show the date; between them they agreed upon the date as February 28th, 1878, and I added it; after I wrote it I read it to both, and Mr. Hill signed it; I then asked Mrs. Hill if she was willing to this, and she said she was, and she signed it too, saying she hoped I would make a good trade, and be able to pay it back."

The facts given in this narrative stand substantially admitted. They describe a transaction at which Mrs. Hill was not only present, but in which she took an important part. She has been examined as a witness in this case, and has had a full opportunity to deny or explain them; if she did not understand or remember them as Edward Day had sworn to them, her interest and her duty required her to deny them; but this she has not done. After he spoke, she kept silent. In this condition of affairs, her silence confirms the truth of his story. There was but one way in which she could have confirmed the truth of his evidence more effectually, and that was by deposing to the same facts.

Now, taking the history of this interview as given by Edward Day to be true, what does it show was the state or condition of Mr. Hill's mind on the 4th of March, 1878? Where there is no reason to suspect fraud, the test in this class of cases is, Did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? He may be old, or enfeebled by disease, or irrational upon some topics, and yet possess sufficient mind to make a valid disposition of his property. In the absence of fraud or imposition, the only question the court is required to consider is, Did the person whose act is challenged clearly understand and comprehend what he was doing when he did it? *Lozear v. Shields*, 8 C. E. Gr. 510; *Eaton v. Eaton*, 8 Vr. 113. It is important to remember that the proceeding in which Mr. Hill was declared to be a person

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of unsound mind was not instituted until more than a year had elapsed after this date, and that the inquisition then taken finds that he enjoyed lucid intervals. The evidence taken in this case shows, with almost entire unanimity, that this finding is true. And what is here meant by lucid intervals is not that the darkness which had come upon his mind was lifted merely for a few moments, or a very brief time, so that the return of the light of reason only served to make the darkness which ordinarily covered his mind more painfully conspicuous, but that his mind-power was so completely restored that his mind seemed to be in its normal condition and habit.

Now, what are the important facts of this interview? When the return of the mortgage was offered, Mr. Hill said it was just where he had always intended it should be. As already mentioned, there is evidence showing that when the assignment was made, he offered to cancel the mortgage as a gift to Mrs. Day. Although this purpose was not then carried out, it is shown that he continued to entertain it, for he subsequently refused to receive payments which were offered to him on it, for the same reason. He also said that he was satisfied with the disposition he had made of the mortgage until the conference at the clerk's office at Tom's River, and there he was induced to think that the mortgage should be returned to him. These remarks show a good memory, and clear understanding and judgment. He remembered what he had done, the motives which influenced him, and that his judgment approved his conduct until new influences were brought to bear upon it, and then that his judgment underwent a change, and he wanted the mortgage returned to him. He was then told what use Day desired to make of the mortgage; that he wanted to pledge it, with another mortgage, for the purchase of a stock of goods, and that he felt confident if he could get the goods, at the low price at which they were offered, he would make money enough on them to return to Mr. Hill all the money he had paid for him, and thereupon he voluntarily said that he was willing that Day should retain the mortgage, and expressed a hope that it would prove useful to him. His attention was then directed to the paper he had given his coun-

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sel, and he was asked if the authority given by it ought not to be revoked. He at once comprehended the necessity of that step, in order that Day might use the mortgage without interference, and directed that it should be taken.

If this is a truthful picture of Mr. Hill's part in this transaction, and exhibits fully all he said and did, there can be no doubt that he fully and clearly understood the nature and effect of his act when he consented that Day should retain the mortgage. His conduct and speech not only show that he knew what he was doing, but that he was capable of exercising ordinary caution and discretion; for when his attention was called to the fact that he had given his counsel written authority to demand the return of the mortgage, he saw, at once, that to enable Mr. Day to use the mortgage as he meant he should, it was necessary that that paper should be revoked, and he accordingly directed its revocation.

But there is another feature of this interview that must not escape attention. Day had been required to return the mortgage under an accusation that he had obtained it fraudulently. The bill charges—and there is little evidence tending to show that the charge is true—that the mortgage was originally obtained under a representation that it should be delivered to Mr. Hill's counsel. Mrs. Hill had been more active and prominent in the efforts made to secure the return of the mortgage than her husband. The mortgage is now returned, and the fraud-doer is not only before Mr. Hill, but also before Mrs. Hill. There is no question about her capacity. If the mortgage had been procured secretly, or by any kind of deceit or falsehood, Day would not only have been a suspected person in her opinion, but she would already have condemned him as a dishonest man. She would naturally distrust and dread him, and would almost involuntarily repel any effort he might make to win her confidence. This would be especially so if she believed that her husband was mentally incompetent to take care of himself, and that Day had already taken advantage of his weakness. She was chiefly responsible for Day's getting possession of the mortgage originally, and now that it is again within her reach, and she has an oppor-

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tunity to remedy the wrong which she had carelessly committed, she would naturally be extremely cautious and wary. But she is not so. She hears her husband say that the mortgage is just where he always intended it should be, without once reminding him that it had been obtained from him by deceit; and when Day asks her if she is willing that he should retain the mortgage, she answers Yes, and expresses the hope that he may make a good trade, without uttering the slightest insinuation, even, that his conduct in the matter had been characterized by anything like deceit, or any sort of over-reaching or imposition.

Cotemporaneous conduct or demeanor, constituting part of the transaction brought under review, is always entitled to very grave consideration in cases of this kind. It generally portrays much more truthfully what a witness understood, thought or believed, at the moment, than words subsequently spoken, even when they are uttered under the sanction of an oath. Looking at Mrs. Hill's conduct, as it is described by the evidence—seeing her get her husband's strong box and deliver it, unlocked, to young Day, in the presence of her husband, and then leaving them, and thus giving young Day full liberty to handle, at his will, all her husband's securities, and then seeing her subsequently, with her husband and the elder Day, discussing the question whether Day should be allowed to retain the mortgage which she had accused him of having obtained surreptitiously, and actually consenting to, and taking part in, the execution of a paper by which his right to use the mortgage for his own purpose was made stronger than it was before—I confess I find it impossible to believe that up to that time she had the least doubt that her husband possessed full capacity to transact any ordinary business, and to form a prudent and sensible judgment respecting ordinary business affairs.

The evidence, in my opinion, demonstrates very satisfactorily that Mr. William B. Hill, on the 4th of March, 1878, when he gave Edward Day authority to pledge this mortgage for the purchase of a stock of goods, possessed sufficient mind to clearly understand what he was doing, and shows, with equal clearness, that he consented to such use being made of the mortgage freely,

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and without the practice of any sort of fraud or imposition.

The authority to pledge the mortgage was given March 4th, 1878, but was not exercised until May 28th, 1878, that being the date of the assignment by Anna Day to the defendant Joseph E. Smaltz. A period of nearly three months elapsed between the date when the authority was given and the time when it was exercised. During this period no attempt was made to recall the authority, nor does any question seem to have been started as to Mr. Hill's competency to manage his affairs. I have not examined the evidence with a view of ascertaining what it shows respecting the condition of Mr. Hill's mind during this period. In view of a recent judgment of the court of errors and appeals, such examination could serve no useful purpose. That tribunal has lately declared that where a principal becomes insane after appointing an agent, the principal's insanity operates, *per se*, as a revocation or suspension of the agent's authority, except in cases where a consideration has previously been advanced in the transaction which was the subject-matter of the agency, so that the power has become coupled with an interest; or where a consideration of value is given by a third person, trusting to an apparent authority, and in ignorance of the principal's incapacity. *Matthiesen Refining Co. v. McMahon*, 9 Vr. 546. The evidence renders it entirely clear that the defendant who now holds the mortgage gave a consideration of value for it, and that when he accepted it, he was not only ignorant that Mr. Hill's capacity had ever been doubted or questioned, but that no facts or circumstances had ever come to his knowledge, respecting Mr. Hill's mental condition, which should have provoked a prudent man to make inquiry. My conclusion is, that the defendant Smaltz holds the mortgage by a valid title.

The only question which remains is, for what sum is he entitled to hold it? Day was authorized to pledge it for a stock of goods. There was no limitation as to amount. So far as appears, there does not seem to have been any negotiation or talk upon that subject. The inference to be drawn from Mr. Hill's expressions would seem to indicate quite forcibly that he

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did not intend to impose any restrictions as to time, amount or persons. He said that the mortgage was just where he always intended it should be, and that he was willing that Day should retain it, and hoped that it would be of use to him. It would seem scarcely possible, under this language, to make any use of the mortgage for the purchase of goods which could be regarded as a misappropriation of it. In my judgment, the defendant is entitled to hold it for the full amount for which it was pledged to him.

The mortgage was not assigned to Anna Day for her own benefit. Her name was used for the purpose of enabling her father to pledge the mortgage for goods; he was to pay the mortgage. The transfer was not made by way of gift, but simply to enable Day to obtain credit. Hence, when the defendant Smaltz is paid, the complainants are entitled to the mortgage. The complainants may take a decree that, on paying Smaltz the amount due to him, together with his costs, he shall assign the mortgage to them.

THE CITY NATIONAL BANK OF PROVIDENCE, RHODE ISLAND,

v.

KATHARINE J. HAMILTON and EBEN G. HAMILTON.

1. A voluntary deed made by a grantor who is indebted at the time of its execution, is void as to creditors whose claims then exist. A conclusive presumption of fraud arises from the mere fact that debts exist and the deed is voluntary.

2. A voluntary deed may be void as to creditors whose claims are contracted subsequent to its execution. If the grantor of such a deed executes it in the expectation of shortly contracting debts, and with the design of so placing the property conveyed that if misfortune afterwards befalls him, and he becomes unable to pay his debts, it shall be beyond the reach of his creditors, the deed will be held void on the ground of fraud.

3. Where a husband purchases land with the separate estate of his wife, and takes title either in his own name, or in that of a third person, a trust results in favor of the wife, and equity will decree a conveyance to her.

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4. If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims.

On final hearing on bill and answer and proofs taken in open court.

Mr. William R. Wilson and Mr. Frank Bergen, for complainants.

Mr. Robert Allen for defendants.

VAN FLEET, V. C.

This is a creditor's suit. A part of the debt on which the judgment is founded was contracted February 25th, 1878. The balance was incurred subsequently. The conveyances, which the complainants seek to have declared fraudulent, appear to have been signed and delivered June 1st, 1877, but were not acknowledged or recorded until January, 1878. The lands the complainants are seeking to reach were conveyed to Eben G. Hamilton by deed dated January 24th, 1867, and he continued to hold the title to them until June 1st, 1877. The title on record stood in his name until January 8th, 1878. In the interval between 1867 and 1878, large expenditures were made upon the lands in the construction of buildings and in ornamentation. On the 1st of June, 1877, Mr. Hamilton conveyed the lands to one Ford, and he immediately conveyed them to Mrs. Hamilton. Just prior to the date of these deeds, Mr. Hamilton had agreed to form a copartnership with two other persons, to carry on a business in the prosecution of which it would be necessary to use capital and incur debts. The copartnership commenced business June 5th, 1877, and the judgment of the complainants is founded on debts contracted by the partnership in February and May, 1878. The complainants charge that the deeds by which title was conveyed to Mrs. Hamilton were voluntary, and were made by Mr. Hamilton in the expectation of incurring

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debts, and with intent to so place his property, that in case the business in which he was about embarking should prove unsuccessful, his creditors could not reach it.

To this, the defendants answer that the lands in question were always, in fact and in equity, the property of Mrs. Hamilton, having been purchased by her and paid for with her money. They further say that the reason they were conveyed to Mr. Hamilton was because Mrs. Hamilton was advised that, inasmuch as she intended to have them extensively improved, under his superintendence, she could greatly facilitate him, and save herself much trouble and annoyance by permitting him to hold the title while the improvements were in progress.

A voluntary deed made by a grantor who is indebted at the time of its execution, is void as to creditors whose claims then exist. A conclusive presumption of fraud arises from the mere fact that debts exist and the deed is voluntary. But a voluntary deed may, likewise, be void as to creditors whose claims are contracted subsequent to its execution. If the grantor of such a deed executes it in the expectation of shortly contracting debts, and with the design of so placing the property conveyed that if misfortune afterwards befalls him, and he becomes unable to pay his debts, it shall be beyond the reach of his creditors, the deed will be held void on the ground of fraud. To illustrate: If a person, just on the eve of embarking in a business which requires both capital and credit to conduct it successfully, should, by a voluntary conveyance, strip himself of a large portion of his property, and make it over to his wife, or distribute it among his children, and then procure the conveyance to be withheld from record, so that he might still trade upon the property as its owner, and, in the interval, incur debts beyond his ability to pay, the transaction would furnish such cogent evidence of fraud against both grantor and grantee that no court would allow the deed to stand for an instant against the persons who had been defrauded by it. The law on this subject is established. A citation of authorities is only useful to show how the law has been applied in particular instances. *Cook v. Johnson*, 1 *Beas.* 52;

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Beeckman v. Montgomery, 1 *McCart.* 106 ; *Belford v. Crane*, 1 *C. E. Gr.* 265 ; *Cramer v. Reford*, 2 *C. E. Gr.* 367.

From the rehearsal of the facts already given, it is obvious, in view of the doctrine just stated, that the complainants are entitled to the relief they ask, unless it has been satisfactorily proved that Mrs. Hamilton was in truth and in equity the owner of the property in controversy when the deeds now sought to be overthrown were made. If those deeds were simply made to invest her with the legal title to what she was before rightfully entitled in equity, their execution was neither a fraud nor a wrong. That appears to have been the fact, and it is established by the evidence so clearly as to be placed beyond all reasonable doubt. It is undisputed that prior to January 1st, 1866, Mrs. Hamilton held the title to two houses and lots in the city of Brooklyn. One she conveyed in February, 1866, for \$7,250, and the other in April, 1866, for \$15,000, making a total of \$22,250. The property in controversy was bought in January, 1867, for less than \$8,500. It thus appears she had abundant means. She swears that she used them in making the purchase, and afterwards in paying for the improvements. Nobody contradicts her. Her husband had not sufficient means to make the purchase. There can be no doubt, in view of the evidence, that the money received for the Brooklyn property was used to pay for the land in controversy. One of the persons of whom the purchase was made, says that a few days before the deed was executed he inquired of Mr. Hamilton to whom the deed should be made, and that he replied that his wife's money would be used to pay for the property, but inasmuch as she expected to be absent in Canada most of the time, and wanted to commence improving at once, it was perhaps best that it should be made to him. It had been previously arranged that Mr. Hamilton should superintend the improvements. So far as appears, there was no reason, at this time, why he should not speak the truth. Besides, the truth of his statement is strongly confirmed by the condition of the parties. His wife was a person of considerable means, and he had none, or very little. Mrs. Hamilton swears that the reason she consented that the deed should be made to her hus-

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band was because she was told it would be easier for her to have it so; she would not then be required to sign contracts, and would thus be relieved from all trouble and annoyance incident to the improvements. She further says that it was understood between her husband and herself that when the improvements were completed he should make the title over to her. There can be no doubt that unless the great bulk of the evidence is discarded as untrustworthy, it must be considered as fully established that the lands in controversy were paid for with the money of Mrs. Hamilton, and consequently they were, in equity, her property. Where a husband purchases land with the separate estate of his wife, and takes title either in his own name, or in that of a third person, a trust results in favor of the wife, and equity will decree a conveyance to her. *Lathrop v. Gilbert*, 2 Stock. 344; 1 Lead. Cas. in Eq. 342.

Nor do I think that it should be held that these lands are liable for the complainant's debt on the ground that Mrs. Hamilton has, either actively or passively, assisted her husband in perpetrating a fraud. It is undoubtedly true that a wife who is herself the instrument of deception, or who contributes to its success, by countenancing it, may, with justice, be charged with the consequences of her conduct. *Sexton v. Wheaton*, 8 Wheat. 229; *Besson v. Eveland*, 11 C. E. Gr. 468. If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims.

In this case, the wife has permitted her husband to hold title to these lands for over ten years, but during that time no debts were contracted on the credit of his ownership. When her husband was about to embark in business, she requested that the title to them should be put in such form that no one could be deceived or misled. The deeds were not put on record at once, but this omission, I think, is satisfactorily explained. Her child was sick, and she was preparing to go to Canada. She says she was anxious about her child, and it was, therefore, quite natural

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that she should have allowed those matters to absorb her whole attention. When she returned from Canada she found that the deeds had not been acknowledged, and could not, therefore, be recorded. She also found that the person who had acted as the medium of transfer to her was absent. As soon as he returned, his acknowledgment was procured and the deeds immediately recorded. No part of the complainant's debt was contracted until the deeds had been on record for more than a month. They did not give credit to the husband, because they believed him to be the owner of the lands in controversy, nor were they in any way misled or deceived by the state of the title.

But the decisive fact against the complainants, in my judgment, is, that the deed to Mrs. Hamilton is not a voluntary deed, but appears to be entrenched in the good faith by which an honest acquisition of property is always distinguished. She had a separate estate, abundantly sufficient to purchase the lands in controversy, and, under the evidence, it is incontrovertible that she paid for them with such estate. Under such circumstances, her title must be considered unimpeachable unless she has allowed the lands in question to be used as the means of deception. That is not shown.

Two or three admissions by Mr. Hamilton were proved, tending to show quite strongly that his object in transferring the property to his wife was to place it beyond the reach of his creditors, but they were made after title had vested in his wife, and are consequently without force against her. No admission or declaration made by a grantor after the conveyance of the estate is evidence against his grantee. *Beeckman v. Montgomery*, 1 *McCart*. 106. The bill of the complainants must be dismissed.

West Jersey R. R. Co. v. Cape May and Schellenger's Landing R. R. Co.

THE WEST JERSEY RAILROAD COMPANY

v.

THE CAPE MAY AND SCHELLENGER'S LANDING RAILROAD
COMPANY.

1. The legality of a corporation, which exists under the form of law, can only be impugned by an application for a writ of *quo warranto*, or by an information in the nature thereof, instituted by the attorney-general.
2. The fact that the right of the complainant depends on an unsettled question of law, is always fatal to an application for a preliminary injunction.
3. It is a maxim of the law of injunctions that a preliminary writ shall not be awarded, except in case of urgent necessity, and when irreparable injury is threatened.
4. Where the averments of the bill are met by a full, explicit and circumstantial denial in the answer, the general rule directs that a preliminary injunction shall be denied.
5. The construction of a horse railroad in a public street, is a legitimate use of the street, and not a taking of private property for public use, within the meaning of the constitution.

On an application for an injunction, heard on bill and affidavits and answer and affidavits.

Mr. Peter L. Voorhees, for motion.

Mr. Samuel H. Grey, *contra*.

VAN FLEET, V. C.

The defendants are constructing a horse railroad in the city of Cape May, with the consent of its common council. They claim to have acquired corporate existence and powers in virtue of the provisions of the general railroad law. The complainants seek by injunction to prevent the defendants from proceeding further in the construction of their road. They ask the interposition of the court on three grounds.

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First. They insist that the general railroad law does not authorize the formation of a corporation to construct a railroad to carry passengers by horse power. It is not disputed that the defendants have formed themselves into a corporation in strict conformity to the provisions of the law just mentioned, and that they have, for some time past, been exercising corporate franchises. They are undoubtedly a corporation *de facto*. When that is the fact, this court cannot, at the instance of private persons, restrain such corporation from exercising the powers usually exercised by similar corporations, on the ground that its organization is not *de jure*. The legality of a corporation which exists under the forms of law, can only be impugned by an application for a writ of *quo warranto*, or by an information in the nature thereof, instituted by the attorney-general. *National Docks Railway v. Central Railroad of New Jersey*, 5 Stew. Eq. 755.

In addition, it is proper to remark that the question whether or not such a corporation may be legally formed under the general railroad law, is, as yet, an unsettled legal problem. That being so, it is obvious the complainants' right to the remedy they seek is not clear, and that fact is always fatal to an application for a preliminary injunction. *Hackensack Im. Co. v. N. J. Midland Railway Co.*, 7 C. E. Gr. 94; *Citizens Coach Co. v. Camden Horse R. R. Co.*, 2 Stew. Eq. 299; *Long Branch Com'rs v. West End R. R. Co.*, 2 Stew. Eq. 566.

Secondly. It is said, even if it be conceded that a horse railroad may be lawfully constructed by a corporation formed under the general railroad law, still such corporation cannot build their road in the manner in which the defendants have built theirs. The road in question has been laid, its whole length, longitudinally over the streets of Cape May city. This method of location, it is contended, is prohibited by the fourteenth section of the law under consideration. No such prohibition is apparent to my mind. The relevant clauses of the section may be rendered as follows: That in case any railroad constructed under this act shall cross any street or highway in any city, it shall build its road either above or below the grade thereof, at such

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distance as shall not interfere with the free and uninterrupted use of the street or highway, provided the common council may grant permission to cross at grade, if they deem it best for the interest of the city. I am unable to discover anything in these provisions which, even by a strained implication, interdicts the construction of a horse railroad lengthwise over a street. As I understand them, they simply prescribe how a steam railroad shall *cross* a public street in a city.

But if we were to concede that the complainants are right on both points, still, I think, it would be manifest that no injunction could issue. A party is not entitled to an injunction simply because he shows that a law has been violated, or that his legal rights have been invaded. It is a maxim of the law of injunctions that a preliminary writ shall not be awarded, except in case of urgent necessity, and when irreparable injury is threatened. *Hinchman v. Paterson Horse R. R. Co.*, 2 C. E. Gr. 76, decides that the construction of a horse railroad in a public street is a legitimate use of the street, and not a taking of private property for public use within the meaning of the constitution. This, I believe, is now regarded as the established doctrine upon this subject in this state. At most, then, the grievance of which the complainants complain can only be esteemed a bare violation of law, which has not and cannot result in legal injury to them. Such a wrong cannot be made the basis of the exercise of the prohibitory power of this court.

The complainants' third ground, if true, unquestionably presents a sufficient reason for the interference of this court. They say the defendants, without right or authority, are constructing a railroad on their lands, which are private property, and to which the public have no right whatever. If this is true, the defendants have violated the security which the constitution throws around private property, and it is, therefore, the duty of the court to exert its power.

But the defendants meet this averment by a full, explicit and circumstantial denial. They say their railroad is located and constructed wholly within the lines of the public streets of Cape May city, and not outside of them, upon the private property

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of the complainants. It would be difficult, I think, to select language by which a more precise and comprehensive denial could be made. The answer of the defendants sweeps away every particle of equity upon which the complainants' title to relief rests. When that is the case, the general rule directs that a preliminary injunction shall be denied.

There are exceptions to this rule, but none of them cover this case.

In the present posture of the litigation, it is clear, upon well-established principles, that the complainants are not entitled to an injunction. The order to show cause must, therefore, be discharged, and the injunction asked must be denied.

ADMINISTRATOR OF SUSAN WILDRICK, deceased,

v.

GEORGE B. SWAIN.

1. The acceptance of the promissory note of a debtor, for a precedent debt, will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect.

2. Where a debtor has attempted to discharge a mortgage with his own unsecured paper promise, given to a person of great age and limited education, he should be required to exercise the most scrupulous good faith, and unless he can show that his creditor fully comprehended the legal effect of the acquittance he induced him to give, it should be adjudged to be without legal force.

3. A receipt is never conclusive evidence of payment, but is always open to explanation or contradiction by oral evidence.

On final hearing on bill, answer and proofs taken before a master.

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Mr. L. D. Taylor, for complainant.

Mr. Carl Lentz and *Mr. John W. Taylor*, for defendant.

VAN FLEET, V. C.

This case presents but a single question. The suit is brought to foreclose a mortgage. The defendant admits a debt of \$350, but the complainant claims a much larger sum. The dispute is confined to the question as to what sum the complainant is entitled to recover.

The mortgage in suit was executed April 10th, 1850, by Abram Wildrick and Isaac Wildrick to Susan Wildrick. The mortgagors were the step-sons of the mortgagee. The mortgage was given to secure the payment of a bond, made by Abram and Isaac to Susan, in the sum of \$2,000, with condition that the obligors should pay the obligee \$120 each and every year during her life. The bond was intended to provide an equivalent for the mortgagee's interest as dowress in the lands mortgaged. Susan died August 3d, 1875, at the extraordinary age of one hundred and one years. All the annual payments accruing prior to April 1st, 1873, are receipted on the bond. The receipts dated prior to April 1st, 1869, are all signed by Susan by a mark. She could not write. That dated April 1st, 1869, and those of subsequent dates, are unsigned. They were all written by Isaac Wildrick, one of the obligors. With one or two exceptions they admit payment in full to date. That of 1861 may be taken as a fair specimen of the whole. It is in these words: "Recd. April 2, 1861, one hundred and twenty dollars in full to date." It is admitted that the sums stated in the receipts were not wholly paid in cash. What transpired when the receipts were given is thus described by Isaac Wildrick, who, as already stated, drew all the receipts:

"She [Susan] always told me how much money she wanted, and I paid her what she told me, and paid the rest in notes; she was satisfied with the settlements by notes and money; she always said she was satisfied with the settlements."

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And as to the circumstances under which the notes were accepted, he testified as follows :

" Q. Did Mrs. Wildrick ever say to you, when you went to settle the interest and you gave her the notes you have testified to, that she never expected or intended that you should pay her the interest you owed her when you gave her these notes? A. She never said to me that she took the notes as pay; how could I tell what she expected? Q. Did she ever say, 'I'll take the notes as pay?' A. Yes, sir; she took the notes as pay, and we settled so every year; that is what she said. Q. Did she say, every year, she took the notes as pay? A. I would not say every year, but she would bring the bond out, and we would settle every year, part in cash and part in notes; that is the way we settled. Q. Did she ever say the notes were to be a final settlement, if they were never paid? A. No such question was ever asked her."

The first receipt was given in 1854, when Mrs. Wildrick was about eighty years of age, and the last in 1872, when she was nearly ninety-eight. The course of dealing, as described by Isaac Wildrick, shows that his step-mother reposed the utmost confidence in him; she allowed him to draw the receipts, to select the language in which they should be couched, and to transact the whole business in his own way. There was no dealing at arm's length, but Mrs. Wildrick did whatever her stepson requested, believing he would not allow her to do anything which might imperil her rights. The relation and character of the parties were such as were likely to inspire a blind confidence on her part. She was the widow of his father, and had a right to rely upon his protection. She was ignorant of the methods of doing such business, and very illiterate. He was a man of affairs, having considerable prominence both as a business man and a politician. He and his brother were the owners of a large amount of property, and were engaged in enterprises of considerable extent. He had been the recipient of repeated expressions of public confidence, having been advanced, by regular gradations, from the office of constable to that of representative in the congress of the United States.

The proposition is quite elementary that the acceptance of the promissory note of a debtor, for a precedent debt, will not operate as a discharge or satisfaction of the debt, unless it is agreed

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that such shall be its effect. In *Schanck v. Arrowsmith*, 1 Stock. 323, Chancellor Williamson declared that the principle was firmly established that the taking of an additional or other security, of inferior or equal degree, would not *ipso facto* discharge a lien which attached by reason of an original security. He further said :

"If the original security is actually canceled, or the lien created by it formally released, of course no resort can be had to it. It is always a question of intention, sometimes to be ascertained by the legal construction of written instruments, and sometimes by the circumstances of the case."

The New York adjudications go one step further in protecting the right of the creditor to his original cause of action. It is there held that the acceptance by a creditor of a new promise from his debtor to pay a pre-existing debt, affords no defence whatever to a suit on the original cause of action, even if the creditor expressly agrees that the new promise shall operate as a satisfaction of the old. And the reason assigned for refusing to give legal efficacy to the promise of the creditor is that it has no consideration to support it, being a mere *nudum pactum*. *Frisbie v. Larned*, 21 Wend. 452; *Cole v. Sackett*, 1 Hill 516; *Waydell v. Luer*, 5 Hill 449; *S. C. on error*, 3 Denio 410; *Rice v. Dewey*, 54 Barb. 455. A rule, the exact opposite of that just stated, prevails in Massachusetts, and also in Maine. There, the law presumes, when a debtor gives his creditor a negotiable promissory note for an antecedent debt, that the creditor accepts it in satisfaction of the original cause of action. 2 *Pars. on Notes* 150, note (a). The rule in force in this state is the one first stated, viz., that a new promise does not discharge the original cause of action, unless it is shown that the parties agreed that such should be its effect. *Freeholders of Middlesex v. Thomas*, 5 C. E. Gr. 41; *Hutchinson v. Swartsweller*, 4 Stev. Eq. 205. An agreement of that character may be established, either by proof of an express contract, or by proof of circumstances which will justify its implication.

The vital question, then, of this case is, has it been proved that Mrs. Wildrick accepted the notes which were given for

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moneys accrued on her bond, with an agreement on her part that her acceptance of them should discharge the lien of her mortgage? The burden of this issue is on the defendant. He asks the court to believe that this old woman, for a period of over twenty years, fully understanding what she was doing, annually consented to accept mere paper promises in satisfaction of her mortgage, though none of them were ever fulfilled, and though, when she accepted the last, the aggregate amount of those previously accepted exceeded the penalty of her bond. It is difficult to believe that any person possessing ordinary selfishness would, for so long a period, pursue a course of such great improvidence; but when it is added that the person who acted thus was a penurious old woman—and that is the character given to her by Isaac Wildrick: he says she was a saving woman, she spent no more than she could help—the story approaches the incredible.

The receipts, under some circumstances, would furnish very cogent evidence that the notes were accepted as satisfaction. But here there is no evidence whatever that the contents of a single one of them were ever made known to Mrs. Wildrick. There is no evidence that they were ever read to her; but that would hardly have been sufficient in a case like the present. In dealing with a person of her great age and limited education, in a matter like that under consideration, where a debtor has attempted to discharge a mortgage with his own unsecured paper promise, he should be required to exercise the most scrupulous good faith, and unless he can show that his creditor fully comprehended the legal effect of the acquittance he induced him to give, it should be adjudged to be without legal force. A receipt is never conclusive evidence of payment, but is always open to explanation or contradiction by oral evidence. *Cole v. Taylor*, 2 Zab. 59; *Crane's admr. v. Alling*, 3 Gr. 423. Chancellor Williamson, in the case already cited (*Schanck v. Arrowsmith*), declared that, in order to determine what effect should be given to a receipt which attempted to discharge a lien without actual payment, the court ought to scan the relation of the parties, see the character of the debt and the consideration given, and ex-

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amine the circumstances attending the whole transaction, and unless it appeared that the person giving the receipt understood his rights and was made fully aware how the receipt would affect them, it ought not to be held that the lien was discharged. And in Massachusetts, where the mere acceptance of the negotiable note of a debtor raises a presumption that the creditor takes it in satisfaction of his pre-existing debt, no less an authority than Chief-Justice Shaw has said that where this presumption will deprive a creditor of a lien without actual payment, it ought not to be made. *Curtis v. Hubbard*, 9 Metc. 322.

When all the facts and circumstances of this case are brought under review, no doubt is left in my mind that Mrs. Wildrick signed the receipts in question without understanding their legal effect, and with no intention to extinguish the lien of her mortgage. She put her mark to them simply because her step-son requested her to do so. She trusted him implicitly, and, I have no doubt, believed that he was incapable of contemplating, much less of perpetrating, a fraud against her. Nor do I think that Isaac Wildrick meant that the notes, unless they were paid, should extinguish the mortgage. He doubtless intended to pay them when he made them, and probably the possibility of his being unable to do so never entered his mind. He endorsed full acquittances on the bond, not because he thought he had discharged the debt, nor because he wanted to be released from it without making an honest payment of it, but because that was the method of doing such business with which he was most familiar. In view of the relations and character of the parties, it is impossible to believe that either thought that the notes would extinguish the debt secured by the mortgage unless they were paid. Can it be doubted that if at any time during their business intercourse it had been suggested that the proper form of receipt to be given was to state that a note had been given for the amount due, which, when paid, should be in full, that it would have been instantly adopted? I believe the mortgagors would as readily have adopted such a precaution as the mortgagee. I am unwilling to believe that the mortgagors ever desired to obtain an extinguishment of the mortgage except by

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fair means. Its execution formed an important part of the original plan of these parties. It was made for the protection of Mrs. Wildrick. The mortgagors doubtless meant that she should have the full benefit of the protection it afforded. Without clear proof, therefore, of a fraudulent purpose on the part of the mortgagors, it cannot be believed that they intended to induce Mrs. Wildrick, year after year, whenever a new right accrued under her mortgage, to release it without payment or compensation, so that, as to the past, she should be placed in exactly the same unprotected condition that she would have been if at the outset she had taken simply their unsecured promise. And yet this is what the defence insists the mortgagors did.

My conclusion is, that the notes were not accepted as satisfaction, and consequently that the lien of the mortgage is still in full force.

At the time the mortgage in suit was executed, Abram and Isaac Wildrick owned the mortgaged premises, together with other lands, as tenants in common. Abram died intestate in 1871, and subsequently a voluntary partition was made. The mortgaged premises fell to the share of the children of Abram. They, of course, took them subject to the lien created by their ancestor. The mortgaged premises were subsequently conveyed to Charles B. Thurston, and by him to the defendant. Both deeds contain this statement: "This conveyance is made subject to certain encumbrances, now liens, on said premises." If either grantee had taken title after an inspection of the receipts endorsed on Mrs. Wildrick's bond, and without notice that they did not represent actual payments, the present defendant would undoubtedly be entitled to hold the mortgaged premises free from the lien of the payments so receipted. *Moore's admr. v. Vail*, 2 *Beas.* 295. But nothing of that kind appears. Neither asked to see the bond, nor, so far as appears, made the least effort to ascertain from the person authorized to speak, what remained due. Under such circumstances, the purchaser of the equity of redemption has simply the equity of the mortgagors, and nothing more. 2 *Jones on Mort.* § 918.

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The complainant is entitled to a decree, but, with the material at hand, it is impossible to fix the amount. The proof, as it now stands, will perhaps warrant the conclusion that Mrs. Wil-drick, at the time of her death, held five notes, amounting in the aggregate to over \$2,400—partly representing the debt secured by the mortgage, and partly representing other indebtedness. The notes are not before the court, nor has any evidence been submitted which will enable the court to determine what part of each of the annual payments was paid in cash, and how much remains unpaid. This matter must be referred to a master, with directions to take proofs and report.

GEORGE D. WOODRUFF et al.

v.

THE MORRISTOWN INSTITUTION FOR SAVINGS et al.

1. In the construction of a release of a mortgage, the question is, not what did the parties mean to do, but what have they done by apt and proper words.

2. Where a recital is followed by general words, the general words will be held to be limited or qualified by the recital.

3. Except under very extraordinary circumstances, a court of equity will not lend its assistance to reform a voluntary deed, or to enforce the specific performance of a voluntary contract.

4. It is an established rule that the assignee of a mortgage takes it subject to all the equities which the mortgagor may claim against it, but free from secret equities existing in favor of third persons.

5. In this state, it is provided by statute that in a suit by an assignee of a mortgage, all just set-offs and other defences shall be allowed against him which would have been allowed if his assignor had brought the action. *Rev. 708 § 31.*

6. A mortgagor may, by concealing his equities, or misleading the assignee, place himself in a position where justice will be defeated if he is allowed to set up, against the assignee, an equity on which he would be entitled to prevail in a suit by his mortgagee. Where the conduct of a mortgagor leads to such a result, courts of equity hold that he is estopped.

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7. Where one person, by either words or conduct, induces another to believe that he may safely purchase certain property, or take a certain security, and he subsequently, relying on such representation, acquires the property or security, the former will never be permitted, in a court of equity, to overthrow the title so acquired.

On final hearing on bill, answer and proofs taken before a master.

Mr. Philemon Woodruff, for complainants.

Mr. S. H. Little, for defendants.

VAN FLEET, V. C.

This action is brought to foreclose three mortgages, all made by Benjamin S. Dean to William Littell. The first is dated June 7th, 1859, and was made to secure \$500; the other two were given for \$700 each, and bear date, the first, January 7th, 1861, and the second, August 15th, 1861. They originally embraced the same lands, consisting of two tracts, one containing forty-nine and fifteen-hundredths acres, and the other four and seventy-six hundredths acres. On the 23d of April, 1869, Mr. Littell, the mortgagee, at the instance of Mr. Dean, the mortgagor, executed an instrument in writing, by which he intended to release to Mr. Dean the tract of four and seventy-six hundredths acres from the lien of all three of his mortgages. Previous to the execution of the release, to wit, on the 1st of February, 1869, Mr. Dean conveyed a part of the tract of four and seventy-six hundredths acres to Mrs. Margaret L. Woodruff, and she, on the 1st of June, 1870, executed a mortgage thereon for \$1,000 to the Morristown Institution for Savings. On the residue of this tract, being the part still held by Mr. Dean, he executed a mortgage to the same institution, on the 15th of July, 1870, for \$2,000. Both mortgages were received by the corporate defendants under an assurance that the mortgaged premises were free from any prior encumbrance. On the 1st of May, 1878, Mr. Littell assigned his three mortgages to the complainants.

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The evidence makes it entirely clear that they are *bona fide* holders for full value.

The release executed by Mr. Littell to Mr. Dean, after stating the date, and names and residences of the parties, recites—

"That whereas, Benjamin S. Dean, by an indenture of mortgage, dated the seventh and fifteenth day of June and August, in the years of our Lord one thousand eight hundred and fifty-nine, and sixty-one, for the consideration therein mentioned, and to secure the payment of the money therein specified, did convey certain lands and tenements, of which the lands hereinafter described are part, unto William Littell; and whereas, the said William Littell, at the request of said Dean, has agreed to give up and surrender the lands hereinafter described unto the said Dean, and to hold and retain the residue of the mortgaged lands as security for the money remaining due on the said mortgages."

It then declares—

"Now this indenture witnesseth, that the said Littell, in pursuance of the said agreement, and in consideration of one dollar to him in hand paid, the receipt whereof is hereby acknowledged, has granted, released, quit-claimed and set over, and by these presents does grant, release, quit-claim and set over unto the said Dean, all that part of said mortgaged lands hereinafter particularly described."

And then describes the tract of four and seventy-six hundredths acres. The question presented for decision, it will be perceived, is, whether or not the complainants are, in equity, under their second mortgage, entitled to a lien, as against the Morristown Institution for Savings, on the tract of four and seventy-six hundredths acres.

The construction of the release, if tested by its words, is free from doubt. The question in such cases is, not what did the parties mean to do, but what have they done by apt and proper words. The whole instrument must be considered, and, if possible, effect must be given to every phrase and word. Where a recital is followed by general words, the general words will be held to be limited or qualified by the recital, in obedience to the maxim, *verba generalia, restringuntur ad habilitatem rei vel personam*. *Broom's Max. 501*. The recitals in this case, though

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expressed in language awkwardly arranged, plainly say that Littell holds two mortgages on the tract of four and seventy-six hundredths acres, one dated June 7th, 1859, and the other August 15th, 1861, which he has agreed to release, and then the release declares that to carry that agreement into effect, its words being, "in pursuance of the said agreement," this indenture witnesseth that he has and does grant, release &c. Construed by its words alone, and seeing nothing and knowing nothing concerning the purposes and intentions of the parties except what appears on the face of the paper, it is obvious that it must be held that the release did not affect or discharge the lien of the mortgage not mentioned in it.

This disposes of the case on the issue made by the pleadings actually filed. The defendants are before the court by answer alone, and could not, therefore, without new pleadings, even if a proper case existed, have the release reformed. But, on the argument, it was agreed by counsel, in order that the real merits of the controversy might be decided, that the defendant's answer should also be regarded as a cross-bill, with a proper prayer for a reformation of the release. The question presented by this arrangement is, are the defendants entitled to a decree reforming the release, so as to make it a release of all three mortgages, against the complainants, who acquired title to their mortgages in good faith and for full value, after the release was made a matter of public record?

I think it may well be doubted whether the instrument sought to be reformed can properly be regarded as falling within the class over which a court of equity may exercise its reformatory power. The release was a pure act of grace on the part of Mr. Littell. He received no consideration for making it, and was under no legal obligation to give it. He executed it as a favor to Mr. Dean. The rule seems to be settled that, except under very extraordinary circumstances, a court of equity will not lend its assistance to reform a voluntary deed, or to enforce the specific performance of a voluntary contract. *Lister v. Hodgson*, L. R. (4 Eq. Cas.) 30; *Turner v. Collins*, L. R. (7 Ch. App.) 342; *Groves v. Groves*, 3 You. & Jer. 163; *Phillipson v. Kerry*, 32

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Beav. 628; *Broom v. Kennedy*, 9 *Jur. (N. S.)* 141, 33 *Beav.* 133; *Fry on Spec. Perf.* 71; *Story's Eq. Jur.* § 787; *Mulock v. Mulock*, 4 *Stew. Eq.* 602. But it is not necessary to decide the case on this ground.

The corporate defendants sit in Mr. Dean's seat. They claim under him, and have a right to urge his equities, but must bear his burdens and submit to the infirmities of his case. It is also true that the complainants took the mortgages subject to any defence or equity which Mr. Dean, or those who have succeeded to his rights, could urge against them, the established rule being that the assignee of a mortgage takes it subject to all the equities which the mortgagor may claim against it, but free from secret equities existing in favor of third persons. *Losey v. Simpson*, 3 *Stock.* 254; *Woodruff v. Depue*, 1 *McCart.* 175; *Starr v. Haskins*, 11 *C. E. Gr.* 414; *Putnam v. Clark*, 2 *Stew. Eq.* 415; *Vredenburg v. Burnet*, 4 *Stew. Eq.* 231. An assignee takes subject to the mortgagor's equities, whether they are open or secret. *Conover v. Van Mater*, 3 *C. E. Gr.* 484; *Atwater v. Underhill*, 7 *C. E. Gr.* 606. The doctrine on this subject was stated with striking brevity by Lord Thurlow:

"A purchaser of a chose in action must always abide by the case of the person from whom he buys; that I take to be a universal rule." *Davies v. Austen*, 1 *Ves. jun.* 247.

A different rule, it is said, should prevail where a mortgage is given to secure the payment of a negotiable promissory note, and the note and mortgage are transferred to a *bona fide* purchaser, before the maturity of the note. In such a case, it has been adjudged by the supreme court of the United States that the assignee has a right to recover the full amount of the note, regardless of the equities existing between mortgagor and mortgagee. The reason assigned for this distinction is, that in such a transaction the note, in law as well as reason, is entitled to be regarded as the principal contract, and the mortgage merely as an accessory or security for the debt evidenced by the note, and consequently that unless the note is treated as possessing the immunity from secret defences which commercial paper is, by law,

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entitled to, the assignee is deprived of his lawful rights under his contract. *Carpenter v. Longan*, 16 Wall. 271. Other tribunals have declared that the fact that the principal contract was a negotiable promissory note, did not entitle the assignee to exemption from the ordinary rule. *Olds v. Cummings*, 31 Ill. 188; *Walker v. Dement*, 42 Ill. 272; *Baily v. Smith*, 14 Ohio 396. In this state, it is provided by statute that in a suit by an assignee of a mortgage, all just set-offs and other defences shall be allowed against him which would have been allowed if his assignor had brought the action. *Rev. 708 § 31*.

The rights of the parties to this controversy must be measured and determined by the rule first stated. That places the present contestants in the same relative position before the court that the original parties would occupy if the one was here asking to foreclose, and the other to reform, and their equities must be gauged by this rule, unless it appears that the complainants have, by some word or act of the mortgagor, been raised to a higher position than that occupied by their assignor. There is no dispute that the release was intended to remove the lien of all three of the mortgages from the tract of four and seventy-six hundredths acres. Mr. Littell swears that he executed it for that purpose. The clear weight of the evidence renders it also entirely clear that the complainants acquired title to the mortgages without notice, either actual or constructive, that the release was defective in any respect, or that it was not, in every particular, just what the parties intended it should be. Now, while it is true that the title of the assignee of a mortgage is always subject to the equities of the mortgagor, it is also true that the mortgagor may, by concealing his equities or misleading the assignee, place himself in a position where justice will be defeated if he is allowed to set up, against the assignee, an equity on which he would be entitled to prevail in a suit by his mortgagee. Where the conduct of a mortgagor leads to such a result, courts of equity hold that he is estopped. The case in which this doctrine is, perhaps, most frequently applied, is where the mortgagor induces the assignee to foreclose, upon a representation that the mortgage is a valid security, and not subject to any defence. *Diercks v. Kennedy*, 1

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C. E. Gr. 210; Bush v. Cushman, 12 C. E. Gr. 131. The case under consideration falls, I think, fairly within this principle.

The release in question was drawn pursuant to Mr. Dean's direction. If it did not fully and truly express the intention of the parties, the fault is his. Mr. Littell had nothing to do with its preparation; he simply executed it on presentation. After it was executed, Mr. Dean accepted it and placed it on record. It was recorded May 21st, 1869. He is chargeable with notice of its contents. He must be held responsible for having made it a matter of public record, for all purposes of notice and caution, after he knew its contents. The corporate defendants are also chargeable with constructive notice of its contents. It had been on record for more than a year when they acquired their first lien. Both they and Mr. Dean allowed it to stand unchallenged for more than seven years before the complainants became the owners of the mortgage in question. This long delay constituted something more than laches; it amounted to acquiescence. Before purchasing, the complainants examined the records. They were not bound to go any further. They had a right to rely on what they found there, and to assume that the release accurately defined and settled the rights of the parties.

These facts are sufficient, I think, to create an estoppel against Mr. Dean; and if he is estopped, so are the corporate defendants, for their title to a reformation of the release is derived solely through him. To constitute an estoppel *in pais*, the defendant must have done an act, or made an admission, the natural effect of which was to influence the conduct of the complainant, and which has induced him to change his position or condition, so that, if the defendant is afterwards permitted to deny the truth of his conduct or his words, the complainant must suffer injury. *Den v. Baldwin, 1 Zab. 403; Martin v. Righter, 2 Stock. 526; Phillipsburg Bank v. Fulmer, 2 Vr. 55; Mutual Life Ins. Co. of N. Y. v. Norris, 4 Stew. Eq. 585.* No argument is required to vindicate the application of this principle to the case in hand. Where one person, by either words or conduct, induces another to believe that he may safely purchase certain property, or take a certain security, and he subsequently

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relying on such representation, acquires the property or security, the former will never be permitted, in a court of equity, to overthrow the title so acquired. *Morris Canal and Banking Co. v. Lewis*, 1 Beas. 332; *Brinkerhoff v. Brinkerhoff*, 8 C. E. Gr. 477.

My conclusion is, that the defendants are not entitled to a reformation of the release, and that the complainant's second mortgage is a valid lien on the four and seventy-six hundredths acre tract.

WOODBURY D. HOLT'

v.

AMOS W. CREAMER et al.

1. No one can be permitted to found a claim or defence on an allegation that he has attempted to cheat his creditors.

2. If a mortgage be given with the fraudulent intent to cover and conceal from the mortgagor's creditors a part of his property, although, as to another part of his property, it is meant to be an actual security for an honest debt, as to creditors it will be altogether void.

3. A mortgagee, to be able successfully to resist the impeachment of his security, must appear to be not only a mortgagee for value, but a mortgagee in good faith. If it appears that his mortgagor executed the mortgage for a fraudulent purpose, and that he knew of such purpose, and took the mortgage to aid him in its execution, his mortgage is void against those who are defrauded by it, even if it is founded on a perfect consideration.

4. The validity of a mortgage made in good faith, to secure future advances, is no longer open to question.

5. The fact that a mortgagee knows that his debtor is trying to magnify his liabilities, and wants him to take a mortgage for a sum so large that if his creditors should regard it as an honest security, his lands would be effectually put beyond their reach, makes it his duty to inquire as to his debtor's object and purpose, and a failure to do so, constitutes a fraud. Fraud may be passive as well as active.

On final hearing on cross-bill, answer and proofs taken in open court.

Holt v. Creamer.

Mr. Woodbury D. Holt, in pro. pers. and *Mr. John N. Voorhees*, for complainant.

Mr. John L. Connet, for defendant Harmen H. Creamer.

Mr. James M. Robeson, for defendant Amos W. Creamer.

VAN FLEET, V. C.

The parties to this controversy were originally brought into court as defendants to a foreclosure suit, the person now appearing as complainant having been made a defendant in that suit because he was a judgment creditor of the mortgagor, and the defendant in this bill was made a party because he held a mortgage, made by the judgment debtor, on the premises sought to be foreclosed. Soon after the parties were in court, the present complainant filed his cross-bill, attacking the defendant's mortgage as a fraud against creditors. Harmen H. Creamer, the mortgagor, also, by answer in the main suit, assailed the mortgage of the present defendant on the same ground. With regard to this last attack, it is enough to say that no man can be permitted to found a claim or defence on an allegation that he has attempted to cheat his creditors. No rule of law is better settled than that a conveyance in fraud of creditors, or other persons entitled to the protection of the statute of frauds, is good as between the parties to it and their representatives. *Pillsbury v. Kingon*, 6 *Stew. Eq.* 287.

The debt on which the complainant's judgment is founded was contracted in 1874, and the defendant's mortgage, though dated April 1st, 1875, was not in fact executed, or even drawn, until April 22d, 1875. The mortgage purports to secure a debt of \$13,974.82, and to provide for the payment of this whole sum, with interest, on the 1st of April, 1876. It is admitted that the sum stated as the debt secured by the mortgage is \$7,000 in excess of the real debt. The defendant, by his answer, claims that the mortgage was given to secure a present debt of \$6,974.82, and to cover advances, to be made in the future, of \$7,000; and that the advances were to consist either

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of money which should be actually advanced, or the conversion of the interest which should accrue on the real debt, into principal. Such conversion was to depend on the option of the mortgagor. The defendant says that at the time the mortgage was made, he held eight promissory notes, and a claim, in the nature of an open account, for nearly \$1,700, against the mortgagor. With the exception of a note of \$44, all the notes were made by the mortgagor directly to the defendant. One of them was made in 1863, more than twelve years before the date of the mortgage, three on the same day in 1869, one in 1870, and three in 1872. Two of those last mentioned bear the same date. On the hearing, the defendant produced a paper, drawn on the day the mortgage was executed, and just prior to its preparation, which shows that the real debt was made up as follows, the interest on each item being computed up to the 1st day of April, 1875:

Note dated April 10th, 1863.....	\$1,430 00
Interest	1,670 16
Note dated March, 1869.....	250 00
Interest	128 51
Note dated March 6th, 1869.....	200 00
Interest	97 42
Note dated March 6th, 1869.....	150 00
Interest	13 02
Note dated July 25th, 1870.....	100 00
Interest	36 92
Note dated April 2d, 1872.....	44 00
Interest	10 19
Note dated April 6th, 1872.....	850 00
Interest	202 25
Note dated April 6th, 1872.....	101 78
Interest	23 61
Two bills, one of \$243.15, and the other of \$1,483.21, amounting together to	1,666 96
	<hr/> \$6,974 82

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If we deduct from the total of \$6,974.82 the two bills amounting together to \$1,666.96, we have a balance of \$5,307.86, which represents the debt evidenced by the notes. Of this sum, \$2,182.08 is interest, and the balance, viz., \$3,125.78 is principal. So it will be observed that the interest which had accrued on the principal comes within only \$943.70 of being equal in amount to the principal. This result was reached by compounding the interest. The mortgagor, it is said, assented to this method of computation. The defendant says the mortgagor had never paid him any interest on any of his claims, yet that he, regardless of this long-continued remissness, continued to make him loans from time to time, without asking to have the interest in arrear on the old securities included in the new, or making it a condition of the new loans that the borrower's legal liability on the old should be revived.

As already stated, the claim in the nature of an open account consists of two separate amounts, one of \$243.15, and the other of \$1,423.81, as they appear on the paper already referred to. Very few of the items composing these claims are the subject of book account, and the amount charged on book is but a trifle in comparison with the aggregate amount of the two claims. The explanation given of these claims is neither satisfactory nor plausible. With regard to the one of \$1,423.81, the defendant says that he presumes the most of it is for rent; that the mortgagor has had the use and occupation of a lot of four acres belonging to him, from 1859 to 1875, a period of sixteen years, and also of another lot of eight acres, for three or four years, and that when the mortgage was given, the sum due to him for this account was agreed upon and included in the mortgage debt, and he thinks it aggregated \$800 or \$1,000, or more. He admits that the mortgagor had made no previous agreement to pay rent; that nothing had previously been said about paying rent for the four-acre lot; that he had never before demanded rent, nor made any charge of it, and that he knew, when he accepted the mortgage, it embraced this lot as part of the mortgaged premises. Each of the parties has a deed for this lot. That of the defendant would seem, judging by the force of the

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papers, to confer the superior title. The claim of \$243.15, the defendant says he thinks represents, in part, notes and other claims collected by the mortgagor for him. The mortgagor swears that, prior to the execution of the mortgage, he had paid to the defendant all he had ever collected for him. The evidence makes it entirely clear that the amount included in the mortgage, on this account, is largely in excess of the amount actually received by the mortgagor.

The mortgagor confesses that he made the mortgage for a fraudulent purpose. His wife left him as long ago as 1863 or 1864. She subsequently threatened to take legal proceedings to compel him to support her. The defendant and he are brothers. He says that after these threats came to his knowledge, he applied to the defendant to assist him in devising a scheme by which his wife's demands might be defeated, and that it was then arranged that he should fabricate a large debt to the defendant, by making notes, without consideration, to him, from time to time, and that the debt thus created should ultimately be made the basis of a mortgage. He further says that the mortgage in question is the consummation of that scheme, and does not represent a single dollar of honest debt. The evidence of a person who confesses that he has been guilty of a fraudulent conspiracy of this character, is, as a general rule, entitled to very little credit, and were the evidence of the mortgagor in this case wholly uncorroborated, I should discard it at once, as unworthy of consideration.

The proofs, considered as a whole, render it entirely clear that at the time the mortgage was executed the mortgagor was indebted to the defendant in some sum of money, but I think the cunning of any ordinary mind would find it impossible, in consequence of the contradictory character of the evidence, both oral and documentary, to determine the precise sum with anything like a fair conviction that the result arrived at expressed the truth with reasonable certainty. I think the evidence also makes it entirely certain that in fixing the present actual debt to be secured by the mortgage, both parties intended to swell it to its utmost proportions, without regard to the real truth or right

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of the case, and that in their zeal to accomplish this result they magnified a comparatively small debt into a very large one. It is manifest that they did not deal at arm's length, but that each made the best use of his cunning to contrive excuses and pretexts which would seem to justify the increase of the grand total to the highest possible figure. It is impossible to believe that in an honest settlement, where the creditor means to get all that is justly due to him, and the debtor means to yield nothing but what duty and right require, that the debtor would agree, without resistance or complaint, to pay, for the use and occupation of lands which he had held in undisturbed possession for sixteen years, under a claim of title, a sum as rent greatly in excess of the value of the lands, and that the creditor, in taking a security for such a claim, would accept a mortgage on the very lands out of which the rents arose. Such a transaction can only be interpreted in one of two ways, either that the parties were too stupid to distinguish the rights of one of them from the other, or that the business in which they were engaged had some ulterior purpose.

The case presents other features which deserve consideration. The defendant says the mortgagor, notwithstanding the fact that his own estimate of the value of his farm was only from \$12,000 to \$15,000, wanted him to take a mortgage on it for \$18,000, which he refused to do, but he admits that he made no inquiry as to his brother's object, and never knew why he wanted him to take a mortgage for so large a sum. It is difficult to understand the defendant's indifference respecting his brother's purposes, unless we assume that he already knew what they were, or suspected enough to make him fear that inquiry might be attended with danger. Two bonds were given with the mortgage, one conditioned for the payment of \$6,974.82, with interest, on the 1st day of April, 1876, and the other for the payment of \$7,000 with interest, on the same day. On the delivery of the mortgage, a paper signed by the defendant, was given to the mortgagor, which states that the bond for \$7,000 had been given to cover any advances of money that might thereafter be made by the defendant to the mortgagor, and also any interest which

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might accrue on the other bond and remain unpaid. It will be observed that the defendant did not bind himself to make any further advance. He says he cannot say that he intended, when this paper was delivered, to make any future advance; his memory is a complete blank as to his intention at that time, but he does remember that on the day the mortgage was executed the mortgagor wanted \$130, but he did not get it. No part of the \$7,000 has been advanced. The mortgage conveyed all the lands owned by the mortgagor. His personal property, at the time the mortgage was given, was insufficient to pay his unsecured debts. It was sold by the sheriff, under a judgment prior to that of the complainant, within less than two years from the time the mortgage was given. Nothing was realized by the sale for the complainant. At the time the defendant's mortgage was made, the mortgaged premises were subject to a mortgage of \$1,500, made in 1873, and also to a judgment of over \$200, recovered in 1874.

The legal rules to be applied in settling the rights of the parties to this controversy are firmly established. There can be no doubt that to the extent that the real debt, which this mortgage purported to secure, was false, the mortgage was without consideration, and consequently fraudulent as to creditors. Nor can it be doubted that if a mortgage be given with the fraudulent intent to cover and conceal from the mortgagor's creditors a part of his property, although, as to another part of his property, it is meant to be an actual security for an honest debt, that, as to creditors, it will be declared altogether void. *Russell v. Winne*, 37 N. Y. 596. A deed which is fraudulent in part, as to creditors, will be declared void *in toto*. *Mead v. Coombs*, 4 C. E. Gr. 112. In such transactions, fraud vitiates absolutely whatever it infects. All the partialities of the law expire under its antipathy to fraud. *Rob. on Fraud. Con.* 521. Mr. Justice Depue is reported to have said recently, in charging a jury, while sitting at circuit, that a debtor has a right to prefer one creditor over others, provided such preference be honestly made; but if the instrument of preference names a sum as its consideration which is larger than the real debt, the instrument is void. The reason of this

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is, that the purpose of such an instrument is to cover up the debtor's property and protect it against his other creditors, and this fraud infects the whole instrument and makes it void *in toto*. 2 N. J. Law Jour. 370 (Dec., 1879.) A mortgage like that under consideration stands on the footing of a conveyance made by a debtor in failing circumstances, to a creditor, in payment of a debt much less in amount than the fair value of the property conveyed. Such transactions, in the language of Chief-Justice Beasley, are well calculated to excite suspicion and awaken vigilance, and a deed made under such circumstances can only be allowed to stand on the ground of its entire *bona fides*, and the burden of proof, in this respect, is on the purchaser. *Demarest v. Terhune*, 3 C. E. Gr. 534. A mortgagee, to be able successfully to resist the impeachment of his security, must appear to be not only a mortgagee for value, but a mortgagee in good faith. If it appears that his mortgagor executed the mortgage for a fraudulent purpose, and that he knew of such purpose, and took the mortgage to aid him in its execution, his mortgage is void against those who are defrauded by it, even if it is founded on a perfect consideration. *Schmidt v. Opie*, 6 Stew. Eq. 141; *Jones v. Naughtright*, 2 Stock. 303.

The validity of a mortgage made in good faith, to secure future advances, is no longer open to question. Such instruments have been repeatedly upheld by the courts of this state. *Bell v. Fleming*, 1 Beas. 19; *S. C. on appeal*, *Id.* 490; *Griffin v. N. J. Oil Co.*, 3 Stock. 53; *Taylor v. La Baw*, 10 C. E. Gr. 222; *MacIntosh v. Thurston*, *Id.* 242; *Platt v. Griffith*, 12 C. E. Gr. 207. To render them valid, it does not seem even to be necessary that the mortgagee should be under a binding obligation to make a further advance, but where that matter is left optional with him, so that he may do it or not, as he sees fit, they have been held good. 1 *Jones on Mort.* § 369. Nor will the fact that a mortgage to secure future advances wears a false or deceitful face, as it does in every instance where it purports to be given to secure a present instead of a future debt, be taken, in every case, as conclusive evidence of fraud, but it is a suspicious circumstance, which will always provoke the most search-

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ing scrutiny. In the language of Chief-Justice Marshall, a deed which misrepresents the consideration on which it is founded, is liable to suspicion, and should undergo a rigorous examination, and not be upheld unless it is shown to be fair. *Shirras v. Crig*, 7 *Cranch* 50. Chancellor Williamson, speaking on the same topic, has said :

"If the transaction is a fair one, there can be no objection to state it as it really exists. By stating it otherwise, it renders the security a suspicious one. It would require very little, in addition to this circumstance, to induce the court to postpone such a mortgage to a creditor or *bona fide* purchaser." *Bell v. Fleming*, *supra*.

He expressed his condemnation of this species of deceit with even more emphasis in the subsequent case of *Griffin v. N. J. Oil Co.*, *supra*.

The test by which instruments of this kind must always be tried is, Was it made for an honest purpose? Here it is undisputed that the mortgagor wanted to give a mortgage for a sum largely in excess of the value of the lands he proposed to mortgage—for a sum so large that it is manifest the defendant declined to accept it, because he believed a mortgage for that sum would show on its face that it was false. The defendant knew that his brother, for some purpose, was trying to magnify his liabilities, and that he wanted him to take a mortgage for a sum so large that if his creditors should regard it as an honest security, his lands would be effectually put beyond their reach. This knowledge made inquiry as to his debtor's object and purposes an obvious duty. A failure to perform it was a fraud. Fraud may be passive as well as active. *Rob. on Fraud. Con.* 589. Silence, under the circumstances stated, can only be explained by attributing to him a willingness to help his debtor in his scheme. By his own confession, then, the defendant occupies this position : At the request of his debtor he accepted a mortgage from him for double the sum he claimed to be due to him ; he did not intend to make further advances, and his debtor did not expect him to do so ; his debtor was not engaged in any business or enterprise which made additional capital either necessary or desirable, and did not

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expect, so far as appears, to be so engaged at any time in the future. It is not pretended that the \$7,000 was intended to constitute a gift. These facts are their own interpreter; they stamp the mortgage as an illusory security. It is a misnomer to call it a security for future advances.

The provision that the interest on the alleged real debt might, at the option of the debtor, be converted into principal, is, in my judgment, the most fraudulent feature of the arrangement. If the whole \$7,000 was intended to cover interest, and nothing else—and we cannot, in view of the evidence, believe it had any other purpose—then we must conclude that the design of the defendant, in taking a mortgage in this form, was to allow the mortgagor to hold the mortgaged premises, against creditors and others, under cover of the mortgage, for such period of time as would be required for the principal debt to earn a sum of interest larger than the principal. A contrivance more inimical to the rights of creditors can scarcely be imagined. Viewed in any light, it is impossible for me to see any honest purpose which could be subserved by placing the consideration of this mortgage at double the sum which the defendant claimed to be due to him from the mortgagor. Whether it was done to frighten off creditors, or for some other fraudulent purpose, it is unnecessary to inquire. One of its natural and inevitable consequences was to conceal the mortgagor's property, and to thwart and obstruct his creditors in the pursuit of their rights. This was enough to render it fraudulent as to them. My judgment is, the mortgage is void as to the mortgagor's creditors, and must be so declared as to the complainant. The complainant is entitled to costs.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY,
MAY TERM, 1881.

THEODORE RUNYON, ESQ., ORDINARY.

In the matter of the application for the assessment of damages upon the bond given by JOHN N. GIVENS, as administrator of David Smith, deceased.

Upon an application to assess the damages on a judgment recovered against an administrator and his sureties, because of his failure to apply to the payment of the intestate's debts the proceeds of lands sold under an order of the orphans court—*Held*,

(1) That since the only question to be now determined is the amount to be raised, the further question whether the administrator *de bonis non* is entitled thereto, is premature.

(2) That as the administrator had authority to sell only the lands specified in the order of the orphans court, his sureties are not liable for the proceeds of sale of any other lands.

(3) That there can be no deduction in the administrator's favor because of his failure to exhaust the personal estate of the intestate in payment of his debts before applying the proceeds of the realty thereto.

Givens's Case.

Mr. J. M. Robeson, for the petitioner.

Mr. J. G. Shipman and *Mr. H. S. Harris*, for the administrator of Frederick Middaugh, deceased, a surety.

THE ORDINARY.

The bond given by John N. Givens, as administrator of David Smith, deceased, late of Warren county, on the granting of an order of the orphans court authorizing him to sell land of his intestate to pay debts, was, by direction of the ordinary, put in suit, and judgment was recovered thereon for the amount of the penalty, \$30,000. Application is now made for the assessment of the damages. The questions presented are, whether the administrator *de bonis non* is entitled to receive the money which may be collected under the judgment; whether there should be a deduction from the balance adjudged by the orphans court, on final account, to be due from Givens, of the amount of the proceeds of the sale of a tract of land which, it is alleged he sold without the order of the orphans court, and carried the proceeds into his account; and also of the amount of certain personal property of Smith's estate, with which the orphans court surcharged his final account.

As to the first question: It is enough to say that the object of the present application is merely to ascertain how much should be raised on the judgment, which is in favor of the ordinary, and therefore the inquiry as to whether the money, when collected, should be paid over to the administrator *de bonis non* to be administered, is not involved.

As to the second question: It is clear that the administrator and his sureties are bound to answer only for the administration of the proceeds of the sale of land sold by the former, pursuant to the order of the orphans court. The administrator had a right to sell only such land, and could give no title to any other. It appears by the record that the orphans court gave him authority to sell the homestead farm, and it is alleged that he sold (for the price of \$405.50) a tract of woodland, some miles distant from that property. The order for sale obviously did not

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extend to that tract, and on establishing the fact that the account included the proceeds of that sale, the proper deduction would be made. There should be no deduction in respect to the surcharges of the administrator's account with personal property not legally accounted for. It was the duty of the administrator to apply the personal property to the payment of the debts before applying the proceeds of the real estate. It was one of the terms of the condition of his bond, that he would well and truly administer the money arising from the sale of the real estate, and he could not do so without applying the personal estate to the payment of the debts before application of the proceeds of the real estate thereto, there having been more than enough of both together to pay the debts. His failure to apply the personal estate to the payment of the debts before applying the proceeds of the real, therefore, is no defence. There will be an order assessing the damages at the amount due according to the account in the orphans court, with interest, unless the before-mentioned allegations, with reference to the unauthorized sale of land, shall be established, in which case the proper deduction will be made in that behalf.

THOMAS E. PERRINE, guardian, appellant,

v.

JOHN PETTY et al., executors, respondents.

1. The 118th and 119th sections of the orphans court act (*Rev. 778*) are intended to protect the estates of decedents from misapplication or waste by executors &c., and being remedial, must be liberally construed.

2. A legacy was given to an infant to be put out on bond and mortgage, and to be paid when the infant attained the age of twenty-one years, with interest accruing thereon. *Held*, that it was the duty of the executors to compound the interest as it accrued, by investing it as soon as practicable thereafter.

3. An executor who, without authority, lends such a fund to his co-executor,

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on inadequate security, is liable for the amount of the principal and compound interest; and the fact that such investment is stated in his account in the orphans court will not exonerate him.

4. The true test in considering the sufficiency of the security for a trust fund, is the price which the property would bring at a forced sale.

On appeal from decree of Middlesex orphans court.

Mr. D. A. Storer, for appellant.

Mr. A. H. Strong, for respondents.

THE ORDINARY.

The 118th section of the orphans court act (*Rev. 778*) provides that whenever application shall be made to the orphans court, by which letters testamentary or of administration or guardianship were issued, or to the president judge thereof, by petition by or on behalf of any person interested in any estate in the hands of any executor, administrator, guardian or trustee, verified by affidavit, alleging that such executor, administrator, guardian or trustee has wasted, embezzled or misapplied the estate entrusted to him, the court or judge, by an order, may compel discovery to be made of the condition of the estate by the production of books, papers and documents relating to the estate or by the examination of such executor, administrator, guardian or trustee, and witnesses, and may take such proceedings for the protection of such estate, by order or decree, as may be taken in like cases in the court of chancery, and compel obedience to such order or decree by the same process and in the same manner as orders or decrees of the court of chancery are enforced.

The 119th section (*Ibid.*) provides that whenever proof shall be made to the satisfaction of the orphans court that the property in the hands of any executor or trustee, under a will, is unsafe, insecure or in danger of being wasted, the court, at the instance of any person interested in the estate of the testator, or in such trust estate, may require such executor or trustee to give security to the ordinary of this state by bond, with sureties, in such

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amount as the court shall deem proper, conditioned for the faithful performance by such executor or trustee of his duty under the will of the testator.

These sections are remedial, and therefore are to be construed liberally. The object of the first is to protect estates against the misconduct of the guardians thereof in embezzling, wasting or misapplying them, by compelling such guardians, when such misconduct has been established, to make restitution. The design of the other is to protect estates in the hands of executors or trustees, under wills, against the danger of such waste or loss, by requiring the executors or trustees to give security. Where an executor or trustee under a will applies to his own use the money of the estate, or the fund entrusted to him for investment, giving, as security for its repayment, only an insufficient pledge of his own property, it is no stretch of construction to hold that he has been guilty of misapplication, within the meaning of the 118th section, above quoted. And where one of two executors or trustees lends the money which they are bound to invest, to the other on insufficient security, he has, at least so far as the security is insufficient, been guilty of waste. And under the two sections above quoted, there is ample power of protection. Whatever the court of chancery might do in the premises in such case, the orphans court may do. Chancery may require the faulty fiduciary to account for the money, and bring it into court. The 119th section of the orphans court act, above quoted, authorizes the orphans court to require security where the property is not secure or in danger of being wasted.

In the case in hand, Nelson Petty, deceased, by his will, gave to Nelson P. Rockafellow \$2,000, "to be put out on bond and mortgage, and to be paid to him when he arrives at the age of twenty-one years, with interest accruing thereon." The will was admitted to probate August 26th, 1869. The respondents, John and Isaac Petty, are the surviving executors. On the 5th of May, 1875, they invested that legacy in a mortgage, given by John Petty, one of the executors, and his wife, to Isaac, the other executor, as such executor, on a farm of the mortgagor of one hundred and two and a quarter acres, in Middlesex county.

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The bond which the mortgage was made to secure is conditioned for the payment of the \$2,000, and interest from June 16th, 1871, to Nelson P. Rockafellow, when he arrives at his majority, or in case of his death, to such person as may be entitled to receive the money. The respondents settled their final account (which was joint), as executors, in the term of September, 1875, of the Middlesex orphans court. The letters testamentary were granted in that court. They prayed and obtained allowance for the \$2,000 legacy as being in the hands of Isaac Petty. In November, 1879, Thomas E. Perrine, guardian of Nelson P. Rockafellow, filed his petition in that court, alleging that the legacy had been invested on wholly inadequate security, and that there had never been any investment of the interest, and praying a discovery and relief, according to the statute. An order for discovery was made. It was, however, discharged March 2d, 1880, on the ground that the respondents had made a satisfactory discovery of the condition of the estate; but, at the same time, the court granted the petitioner leave to ask the further aid of the court, on filing a new petition for the purpose.

On the 15th of March, 1880, in pursuance of that permission, a new petition was filed, setting forth the filing of the former one, and the proceedings under it, including the discovery as to the before-mentioned investment, alleging that Nelson P. Rockafellow will not attain his majority until December 27th, 1884; that there will then be due and payable, on the mortgage, at simple interest merely, the sum of \$1,894.41; that he is also entitled to \$112.76, for interest on the legacy from August 26th, 1870, one year from the date of probate of the will, to the time, June 16th, 1871, fixed in the mortgage as the period at which the interest thereon began, and that on the principle of investing the interest, as it becomes due annually, he will, at twenty-one, be entitled to the further sum of \$879.97. It prays an account and an order directing John Petty to pay over to his executor the interest already due on the mortgage, with the amount which would have accrued thereon if invested annually, or to pay over the principal, also, together with those moneys; and it prays,

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also, for such order as to the court may seem proper, having for its object the safe investment of the \$2,000, and the interest already accrued thereon.

After hearing, that petition was, by order of December 15th, 1880, dismissed, on the ground that the petitioner was entitled to no relief. From that order this appeal was taken.

The evidence (which is that which was taken under the petition for discovery) discloses the fact that the farm on which the mortgage is, was purchased by John Petty, the mortgagor, in 1869, for \$32 an acre, or \$3,272, and it is shown that land in that neighborhood will not bring as much (some witnesses say not over half as much) as it did in 1869. John Petty testifies that he considers the farm worth \$60 an acre, or \$6,135 for the property.

His three witnesses estimate the value at from \$40 to \$55 an acre, or from \$4,090 to about \$5,625 for the farm. On the other hand, the five witnesses on the part of the petitioner estimate it at only from \$20 to \$30 an acre, or from \$2,045 to about \$3,067 for the property.

The property appears to be but an indifferent one at best. It seems that much of the land is wet, and it is even said by some of the witnesses that about fifty acres of it are covered with bulrushes and about fifteen with scrub-oaks.

The valuations of the witnesses of the parties range, it will have been seen, from \$2,045 to \$5,625. But none of them speak of the price which the property would bring at a forced sale, and, in considering the sufficiency of the security for a trust fund, that is the true test.

It is entirely clear that the testator intended that the interest on the legacy should accumulate up to the time of the legatee's majority. He certainly did not intend to give the use of the interest to his executors. Between the period of one year from the time of the issuing of the letters testamentary and the time when the legatee will attain his majority, is a period of fourteen years.

The executors under such a trust as that created by the will with reference to the legacy, are bound to accumulate the inter-

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est, notwithstanding the absence of any direction to that effect in the will. *Perry on Trusts* § 622. In disregard of this obligation, one of the executors was permitted to take the fund on the agreement to pay it over, with simple interest merely, whenever the fund shall be payable.

The executors are both bound to answer for interest upon the interest of the fund. The fact that in their final account allowance was prayed and granted for the principal as being in the hands of one of them, will not exempt the other from liability in the premises. When that account was passed they were both charged with a duty with regard to the fund, from which that allowance did not discharge Isaac Petty. That duty was to invest the fund and attend to its safety and increase. The allowance in the final account was an admission that they had the fund and a statement that it was in the hands of one of them. It was not even stated in the account that it was invested. If Isaac Petty had before that time lent the fund to his co-executor, on insufficient security, that allowance surely would not relieve him from liability for the consequences of the act. If it were conceded that the farm is worth \$50 an acre, \$5,112.50 for the property, the amount which will be due on the mortgage, \$3,894.41, at the legatee's majority, at merely simple interest, is more than two-thirds of its value. The evidence, however, will not warrant that valuation. The security is not an allowable one, for the whole amount of the principal and interest. The interest should have been payable half-yearly, and John Petty should have paid it over as it accrued, and when paid it should have been invested as soon as reasonably practicable. Under the circumstances, the executors are both chargeable with the fund and the accrued interest thereon, and interest upon the interest. They should be required to pay the fund into court, with the interest accrued and interest thereon, and to that end should come to an account with respect thereto.

The order appealed from will be reversed, with costs.

Stelle's Case.

In re the estate of SAMUEL C. STELLE, assigned for the benefit of his creditors.

After the damages have been assessed against an assignee and his surety, on their bond given under the assignment act, the surety cannot have the amount of a creditor's claim deducted therefrom, on the ground that it was not presented to the assignee under oath, where such claim was allowed and included in all of the assignee's accounts, and no creditor objects thereto. He is bound to answer for all the money found due from his principal.

Mr. C. T. Cowenhoven, for applicant.

Mr. A. V. Schenck, for Juliet Stelle.

THE ORDINARY.

The bond given according to the statute by the assignee of Samuel C. Stelle, was prosecuted by direction of the ordinary, and a judgment was rendered thereon against the assignee and his surety for the amount of the penalty. The damages were assessed by the ordinary, and execution issued for the amount thereof, and costs accordingly. The surety applies for a reduction of the amount of the assessment to the extent of the dividend allowed to Mrs. Juliet Stelle by the decree made on the assignee's final account. That dividend was ordered on a claim originally in favor of the Raritan Building Loan Association, and assigned by the association to Mrs. Stelle. The ground on which it is urged that it should be disallowed is that the claim was not presented under oath or affirmation. The claim was based on the assumption by Samuel C. Stelle, on the conveyance of land to him, of a mortgage thereon, the amount of the mortgage being allowed to him as so much of the purchase-money. The property passed to the assignee under the assignment. He appears to have obtained from the association a statement of the amount due on the mortgage, and to have reported

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it as a claim to that amount against the estate, in favor of the association. He sold the property subject to the mortgage, and the mortgage was afterwards foreclosed. The decree of foreclosure was assigned to Mrs. Stelle, in consideration of the payment by her of the full amount due thereon. The property was subsequently sold under the foreclosure, and there was a deficiency. In the assignee's final account, made after the sale under the foreclosure and before the suit was brought on the assignee's bond, the debt of Mrs. Stelle was stated at the amount due for the deficiency. There never was any exception filed to the claim. The assignee not only reported but swore to it in 1876 as a claim duly made, and it was afterwards sold to Mrs. Stelle. Subsequently to the sale of the claim to her, it was put in the assignee's account in her own name, and by order of the court she was declared to be entitled to a dividend on it. But, further and principally, by his final account it appears that the assignee had in his hands a certain sum of money distributable among the creditors. Who those creditors are, and what is their dividend, the court has settled. No creditor is here objecting to Mrs. Stelle's claim, but it is the surety who objects, and who thus seeks to avoid payment of part of the money which it is admitted is due from him. The creditors have never questioned Mrs. Stelle's right to a dividend. If the present application were successful, the practical effect would be to relieve the surety from the payment of money which he is clearly, both legally and equitably, bound to pay. He is bound for all the money which, according to the final account of the assignee, was in the hands of the latter for distribution among the creditors. By this application he practically seeks to be relieved from the payment of part of it, not on the ground that it is not due from the assignee, but on the ground that a creditor whom the court decreed to be entitled to it ought not, as between her and the other creditors, to have it. That is a matter which does not concern him. The application is denied, with costs.

Storms v. Quackenbush.



JACOB I. STORMS, appellant,

v.

JOHN QUACKENBUSH, respondent.

One of two executors collected a large amount of money due the estate, without his co-executor's knowledge, and, in order to secure the estate, gave a mortgage on his own lands, payable to himself and his co-executor. The property covered by the mortgage was sold under a prior mortgage, and nothing realized therefrom for the estate. *Held*, that the delinquent executor was not, by giving the mortgage, exonerated from liability to his co-executor.

On appeal from decree of Passaic orphans court.*Mr. H. S. Drury*, for appellant.*Mr. Luther Shafer*, for John Quackenbush.*Mr. R. I. Hopper*, for Margaret A. Yeomans et al.

THE ORDINARY.

Jacob I. Storms and John Quackenbush are the executors of Samuel J. Yeomans, deceased. Storms collected a large amount of money due the estate, without the knowledge of Quackenbush. To secure it to the estate, he gave Quackenbush a mortgage, made in favor of himself and Quackenbush, as executors, for \$2,400, and interest. No part of the principal of the mortgage was ever paid, and Quackenbush has charged himself with all the interest he received upon it. There was a prior mortgage for \$950 on the property, under which it was sold on foreclosure, and it brought no more than enough to pay that mortgage. The controversy between the parties to this appeal is as to the liability of Quackenbush to answer in exoneration of Storms for the amount of the mortgage. Storms claims that it was understood

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and agreed between them, when the mortgage was taken, that it was accepted in discharge of his liability to the estate, and that on giving it he was to be regarded as released. After giving the mortgage, Storms sold the mortgaged premises to Van Wagoner, by whom they were sold to Berry, who, at Quackenbush's request, conveyed them to Quackenbush's wife. In obtaining a conveyance to his wife, Quackenbush seems to have been actuated merely by a desire to get the rents for the estate. He bought the property at the sheriff's sale, under foreclosure of the prior mortgage, and paid the percentage required as a deposit, but, for want of money, did not complete the purchase, and the property was therefore resold. Nothing was realized from the sale to be applied to the mortgage held by him for the estate. The mortgage, as before stated, was given to both executors, Storms and Quackenbush. Storms did not pay his debt by giving the bond and mortgage, nor did he, by that means, obtain a discharge from his liability to the estate for it. He seeks to shift the debt from himself to his co-executor, simply on the ground that, as he says, the latter was willing to accept, in discharge of his liability, his obligation, instead of the debt; to accept a pledge of property to secure the debt, instead of requiring him to pay the money. His claim is not sustained. The very bond and mortgage themselves show that no release to him was contemplated, for they are in favor of himself as well as Quackenbush. Quackenbush testifies that they were taken to accommodate Storms and protect the estate. Storms is chargeable with the money. The decree of the court below will therefore be affirmed, with costs.

Allen v. Sanders.

THEODORE ALLEN et al., appellants,

v.

ELIZABETH SANDERS, respondent.

The right of sureties to be relieved from responsibility for the future acts or defaults of administrators or guardians is absolute, and, on a proper application, must be granted. Where, however, the sureties do not appear on the day set by the court for the hearing, their application may be treated as abandoned, and may be dismissed.

On appeal from decree of Somerset orphans court.*Mr. John Schomp*, for appellants.*Mr. J. J. Bergen*, for respondent.

THE ORDINARY.

The sureties of Elizabeth R. Sanders, a guardian appointed by the orphans court of Somerset county, desiring to be released from responsibility on account of her future acts or defaults, made application to that court for relief, under the 124th section of the orphans court act. *Rev. 779*. The court thereupon cited her, according to the provisions of that section. She filed her account pursuant to the citation, and it was settled. By it, she appeared not to be indebted to her ward, but, on the contrary, there was a balance due her. The orphans court, after passing the account, made an order denying the prayer of the petition, with costs. From that order the sureties appealed to this court. The section above referred to is part of the act of March 1st, 1859 (*P. L. of 1859 p. 74*), repealed in the revision. By that act, provision was made for the relief of sureties. Its provisions are incorporated in the 124th and 126th sections of the revised orphans court act. By the 124th section, the court is, when the application is made, to cite the executor, administrator or guard-

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ian, not only to state and settle his or her account, but also to give new sureties, in the usual form, for the discharge of his or her duties. By the 4th section of the act of 1859, above mentioned, it was provided that if the executor, administrator or guardian should not, on the return of the citation or within such reasonable time as the court should allow, state and settle his account, and give new sureties to the satisfaction of the court, the court should, by order or decree, revoke the letters testamentary, of administration or guardianship, and appoint some other person in his stead. That provision is substantially embodied in the 126th section of the revised act, which provides that if any executor, administrator or guardian neglects or refuses to obey or perform an order of the orphans court requiring him to file an inventory or account, or give security, the court may revoke his letters and remove him from office. The object of the 124th section is to enable sureties to obtain relief from responsibility for future acts or defaults, by the means provided by that section, and it is made the duty of the court, on the application, to require the executor, administrator or guardian, by citation, not only to state and settle his account, but to give new sureties. If, on being so cited, he shall not give such new sureties, it is the duty of the court to order him to do it, and if he neglects or refuses to obey the order, it is its duty to revoke his letters and remove him. The sureties' right to relief does not depend on the exercise of the discretion of the court, but it is an absolute right which the court is bound to secure. In this case the guardian in fact had never accounted, though she had been in office for many years.

It appears, however, from the record, that the sureties did not appear on the day for which the hearing of the matter was set down by the court, and the court therefore denied the prayer of the petition. The court properly treated the application as abandoned. It should not, however, under the circumstances, have imposed the payment of costs on the sureties. The decree will, therefore, be reversed as to the costs, but otherwise affirmed, with costs.

Robbins v. Mylin.

HARRISON ROBBINS, administrator &c., appellant,

v.

MARY ANN MYLIN et al., respondents.

The claims of certain creditors of a decedent to share the proceeds of the sale of his lands to pay debts, were rejected, because they were not presented under oath. An order was made, distributing to the widow and children the surplus remaining after the payment of the debts which had been regularly proved. Afterwards, a suit in chancery was begun by some of the creditors whose claims had been rejected, and the administrator enjoined from paying over the surplus to the widow and children. The chancery suit was subsequently compromised by the widow, on her own behalf, and as the guardian of the children, agreeing to the payment of part of the creditor's claims out of the surplus, and a release therefor was given to the administrator. On a petition by the widow to the orphans court for an order to compel the administrator to comply with the original order of distribution of the surplus—*Held*, that the release was conclusive on the orphans court, and the widow estopped thereby.

Appeal from order of Camden orphans court.

Mr. P. L. Voorhees, for appellant.

Mr. J. T. Woodhull, for respondents.

THE ORDINARY.

Letters of administration of the estate of Amos K. Mylin deceased, were granted by the surrogate of Camden county to the appellant and John H. Mylin, March 13th, 1871. An order to limit creditors was taken on the same day, and another barring creditors who had not put in their claims within the limited period, was made on the 4th of March, 1872. On the 13th of May following, a decree was made that the administrators proceed as if the estate were insolvent, and make sale of all the real estate. By that decree the court struck out of the list of

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claims presented within the limited time those of Budd Doble, Fitzwater & Reily, Thomas Bond, James Newcomb and Henry V. Leslie, respectively, on the ground that they had not been put in under oath or affirmation. They amounted, in the aggregate, to \$1,045.44. The land having been sold, the administrators filed their final account, which was settled January 17th, 1873. There was a balance, after paying all the debts which had been allowed, and the expenses of the administration, of \$1,651.95. This the court, by the order allowing the account, ordered to be distributed according to law. On the 18th of February, 1874, the court made a specific order of distribution, directing that \$550.65 of the balance be put at interest for the use of the widow of the intestate for life; the principal, at her death, to be distributed among his nine children; and that the sum of \$1,101.30, being the remainder of the \$1,651.95, after deducting the amount set apart for the widow, be equally divided among the children. On or about the 11th of July, 1878, the widow and children filed their petition in the orphans court, sworn to by the widow and the adult children (the widow was guardian of the minors), stating that the greater part of the business of the estate had been done by Robbins, and that he had the custody of the \$1,651.95; that he had wholly refused and neglected to carry out the order of distribution, notwithstanding repeated and urgent requests, until April 19th, 1878, and he then did not carry it out completely, but only made partial distribution; that on or about the last-mentioned date, he, in answer to repeated demands, at length tardily consented to distribute, not the whole, but only the half of the money ordered to be distributed; that he, in fact, on that day paid to the widow only the sum of \$825.97½, and to the heirs only one-half of the sum to which they were justly entitled; that since that date he had not paid any of the money which then, and at the filing of the petition, remained in his hands subject to the order of the court, and they prayed the court to compel the administrators to complete the distribution according to the order therefor, or show cause why they should not pay to the petitioners \$825.97½, with interest and costs. An order to show cause was granted July 13th, 1878.

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Under it, testimony was taken, and on the 29th of January, 1881, the court decreed that Harrison Robbins, one of the administrators, should, within fifteen days from the service of a copy of that decree on him, "pay the sum of \$1,651.95, with interest compounded by annual rests, from January 17th, 1873, to the date of the payment of \$825.95 on the 19th of April, 1878, and with interest compounded on the balance from the date of that payment to the date of the decree, viz., \$1,807.24, with costs to be taxed," to the complainants or their proctor, and that if he fail to do so, an attachment be issued against him for contempt. From that decree Robbins appealed to this court.

It appears that on the 2d of March, 1874, a few days after the order of distribution was made (which was February 18th, 1874), an attorney at law of Camden wrote to Robbins, informing him that Doble and Fitzwater had placed their claims against the estate of the intestate in his hands, and intimating an intention to have recourse to litigation, if necessary, to collect them. On the 26th of February, 1878, a bill was filed in the court of chancery by the persons whose claims had been disallowed, and others whose claims had not been put in, against the administrators and the widow and children of the intestate, the object of which was to obtain the application of the balance ordered to be distributed to the payment of their debts, together amounting, according to the statements of the bill, to about \$2,300. The complainants alleged that the fact that their claims were not put in as required by law was attributable to the negligence of their attorney. On the filing of the bill, an order to show cause why an injunction should not be issued according to the prayer of the bill, was granted. It appears that the suit was no further proceeded in, because a settlement was made between the counsel of the widow and children and the counsel of the complainants. By that settlement it was agreed that the widow and children should receive \$925.95 of the money ordered to be distributed, \$100 of the amount to be paid to their counsel as his fee in a suit at law brought by one of the children against the administrators to recover its distributive share, and the complainants to have the rest. The settlement was carried

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out, and the \$825.95 paid to the widow and children, and the \$100 to their counsel. On making the payment to the former, a release under seal was given, signed by the widow and adult children, and by the former as guardian of the minors. It, in consideration of the \$925.95, released the administrators from all further responsibility or liability whatever as administrators, and they were thereby declared to be released and forever discharged by the widow, for herself and as guardian of the minors, and by the other heirs, from all claims or liabilities as administrators, in favor of the guardian or heirs at law. It is dated March 10th, 1878 ; it was not delivered, however, until April 19th, 1878, when the \$829.95 were paid. When that payment was made, the widow gave a receipt, acknowledging the receipt thereof in full for the distributive share of her children and herself. The receipt stated that she was authorized to receive the shares of the children, adults as well as minors.

The orphans court, by its action in ordering the appellant to pay the widow and children the money which, in the settlement, it had been agreed should go to those who claimed as creditors, in effect undertook to set aside the release, presumably for fraud. The release was a conclusive answer in that court to the claim made by the petition. The orphans court had no jurisdiction to set it aside. The petitioners mistook the form in which the relief which they sought was to be obtained. The petition made no mention of the settlement nor any reference to it, and therefore, while, on the petition, the court properly made the order to show cause, yet when the administrators proved the release it was its duty to discharge the order. The order appealed from will be reversed, with costs,

Valentine v. Smith.

CALEB H. VALENTINE, executor &c., appellant,

v.

DANIEL H. SMITH et al., respondents.

A testator directed his executors to invest a fund and to pay to his widow, for life or widowhood, one-third of the interest thereof, and to his children and grandchildren, whom he named, the remaining interest in designated portions; that if any such child or grandchild should die without issue, the survivors should take such decedent's share in like portions; that, if any of them should die leaving lawful issue over twenty-one years of age, the executors should pay to the representatives of such decedent the principal on which such decedent had received the interest. One child died during the lifetime of the widow, leaving a daughter over twenty-one.—*Held*, that the executors could pay her the principal of her share on her producing the widow's release of her interest therein.

Appeal from decree of Morris orphans court.

Mr. H. C. Pitney, for appellant.

Mr. A. C. Smith, for respondent.

THE ORDINARY.

James Smith, late of Morris county, deceased, by his will directed his executors to convert all his property into money and invest the proceeds on bond and mortgage of real estate. He then ordered them to pay his wife, in lieu of dower, every year during her life, or so long as she should remain his widow, the one-third of the interest, and directed that the rest of the interest should be divided into twenty-five equal parts or shares, and directed his executors to pay to seven of his children three of those shares each, to one of his grandchildren one, and to two others one and a-half each, for their respective lives, and that at the death of his wife the interest given to her should be dis-

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tributed among those children and grandchildren according to the provisions just mentioned, made in respect to the other part of the interest. He then provided that, should any of them die without leaving lawful issue surviving them, the shares of interest given to them should go to the survivors in the same manner and in the same ratio as therein before stated; and in case any of them should die leaving lawful issue over twenty-one years of age, his executors should pay to the representatives of such child or grandchild so dying the principal money of which such child or grandchild so dying received the interest. The executors converted the property and invested the proceeds. The widow is still living. One of the children, Mrs. Crater, has died, leaving a child, Mrs. Foster, over twenty-one years of age. After her mother's death, the executors, with the widow's consent, evidenced by her release, paid over to Mrs. Foster her share of the whole of the principal of the fund, and the question is, whether he should have allowance for such payment.

By the will, the testator, in effect, gives the interest of the whole fund to the children and grandchildren, whom he names, for life, subject to the gift of one-third of it to his wife during her widowhood. He provides that the shares may be increased by the death of any without leaving lawful issue surviving (and, in fact, they were so increased from twenty-fifths to sixteenths), and that in the case of the death of any leaving lawful issue of age, the issue shall have that share of the principal to the interest of which the parent was entitled. He expressly directs the executors, on the death of any, leaving such issue, to pay over such share of principal to such issue. Mrs. Foster's interest in three-sixteenths of the whole fund, vested in her on her mother's death, subject to the widow's right to the interest of one-third of it. That right has been extinguished by the widow's release. Neither Mrs. Foster nor the widow excepts. It is urged, on the part of the exceptants, that it was the testator's design to keep the fund undistributed until the death of the widow, and that to make any distribution of it before that time would be unjust to the widow and the parties in interest not receiving their shares, because the former is entitled to one-third

Mandeville v. Parker.

of the interest of the whole fund, and not to the interest of one-third of the fund, and she and they are entitled to have the whole fund kept intact until her death, in order that loss occurring to the fund from depreciation or mismanagement may be borne proportionately by all the parties interested. I see no evidence in the will of an intention on the part of the testator that the whole fund shall be kept undistributed until the widow's death. He certainly has not specifically declared it, but, on the other hand, he expressly provides that, on the death of any of the children or grandchildren leaving issue of the age of twenty-one years, the executors shall pay over the decedent's share of the principal. Had he intended that there should be no distribution until after his wife's death, it is reasonable to suppose that he would have guarded against it in connection with the provision just referred to. There is no ground for such construction. The suggestion that it is necessary to the equitable administration and distribution of the fund, in view of possible loss, that it should be kept intact until the widow's death, is not entitled to weight. *Wetmore v. Zabriskie*, 2 Stew. Eq. 62.

The decree of the orphans court will be reversed, with costs.

ABRAHAM MANDEVILLE et al., appellants,

v.

JANE PARKER et al., respondents.

Mr. A. W. Bell, for appellants.

Mr. A. Mills, for respondents.

Luse v. Rarick.

THE ORDINARY.

The decree of the orphans court in this case was affirmed. I do not regard the case as one in which it would be proper to order the appellants' expenses of the appeal paid out of the estate.

ANN LUSE, appellant,

v.

ANDREW RARICK, surviving executor, respondent.

An order allowing executors \$500, for services rendered the estate, was made by the orphans court in January, 1880. The surviving executor filed his account in June, 1880, and prayed allowance for the \$500, and also for \$50 paid by him to the *cestui que trust*, out of \$250 of the principal which had been paid in. To this account the *cestui que trust* excepted, because the allowance of the \$500 was excessive, and also excepted "to the money collected on the principal of said estate." Both exceptions were disallowed, and on appeal—*Held*,

- (1) That the appeal from the allowance of the June account did not bring up for review the allowance of the \$500 under the January order.
- (2) That whether the executor was chargeable with interest on the \$200 of the principal remaining in his hands, could not be considered, because no exception on that ground was taken below.

Appeal from decree of orphans court of Somerset county.

Mr. W. W. Anderson, Mr. Gilhooly and Mr. J. J. Bergen, for appellant.

Mr. J. D. Bartine, for respondent.

THE ORDINARY.

George Luse, by his will, directed his executors to pay to his

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wife \$300 for each year, and at that rate for any fraction of a year, between the time of his death and the passing of their final account, for the support of herself and family, and he directed them to invest the net balance of his estate and pay her the interest annually so long as she should remain his widow. And he authorized them, in case they should think the interest insufficient for her proper maintenance, to pay her from time to time so much of the principal as they might deem proper. The executors, Cornelius W. Schomp and Andrew Rarick, settled their final account January 12th, 1861. By it, it appeared that they were chargeable with a balance of \$8,893.82. Commissions (\$593.82) were allowed them on that account. They appear to have duly invested the money (part of it, in a house and lot for the widow), and to have paid over to her the interest and some of the principal. In 1872, Schomp died, and Rarick continued, as he still does, to execute the trust alone. Previous to January 23d, 1880 (but at what particular time does not appear), application was made to the orphans court, by Rarick, as surviving executor, for an allowance of commissions, and on that date an order was made, by which, after reciting that it appeared that from 1861 to 1872 the executors had jointly administered the estate; that in the latter year, Schomp died; that since that event, Rarick had had sole charge of the estate; that neither of them had received any commissions or allowances for those services, and that it had been made to appear to the court what amount of money had come to their hands and been paid her by them, it was ordered that the executors be allowed \$500 as and for their commissions from the time of their appointment until the 1st day of April, 1879, and that the amount be retained out of the interest of the investments of the estate, and be divided between Rarick and the personal representatives of Schomp proportionately, according to the time of service of each executor. That order has been brought up in the transcript, but it was not appealed from. In June, 1880, Rarick filed his account of the dealings of the executors with the estate up to that time, and in it he prayed allowance for the \$500 as commissions allowed by the order of January 23d, 1880. He also reported that \$250 had been paid

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in on the principal in January, 1879, of which he had paid the widow \$50, for which latter sum he prayed allowance. To that account the widow excepted as follows: "First, to item of \$500, for commissions in said account, as excessive." "Second, to the item of \$250 collected on the principal of said estate." The court having heard the exceptions decreed, August 24th, 1880, that the account be allowed as stated and reported, and that "the legal commissions, by the consent of both parties allowed the surviving executor, be taken from the principal fund of the estate." The widow appealed from so much of that decree as ordered the payment of the commissions, and also from so much as allowed the deduction of \$250 from the principal fund of the estate without the allowance of interest therein.

The order of January 23d, 1880, was not appealed from, as before stated, and though it has come up in the transcript, it does not appear, except from its title and recital, and a recital in the decree appealed from, under what circumstances it was made. It appears, from a recital in the decree appealed from, that it was not only made on notice, but by consent of the parties; for that decree refers to the commissions as having been allowed to the surviving executor "by consent of both parties." The allowance made by the order of January appears not only to have been of a gross sum, but also for services which had already been paid for in the allowance of commissions in the account of 1861, for it gives the \$500 for services from the "time of the appointment" of the executors to April 1st, 1879. They had, in fact, received no compensation for their services from the time of passing their account in 1861. The inventory was filed in March, 1859. Inasmuch as the order was not appealed from, however, it is not before me for review, unless brought here by mere force of the appeal from the decree of August. That decree allowed the account, with the commissions, as having been fixed by the previous order of January. The appellant, who had not appealed from, nor, as far as appears, before that time, dissented from, the order of January, excepted to the allowance as excessive. If that order was made "with the consent of all the parties," the exception was properly overruled, and in the

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absence of all knowledge of the circumstances under which it was made, except the statement just quoted from the decree appealed from, it must stand. Nor is the allowance so excessive as of itself to demand condemnation. From 1861 to 1879, a period of eighteen years, the executors had, as trustees, invested the sum of about \$9,000; about \$2,000 of it in a dwelling-house for the widow (they appear to have bought the lot and built a house and barn on it), and paid over to the widow the interest regularly, and without any loss whatever. It appears, on the other hand, that the investments, except the house and lot, are all on bond and mortgage, and that they are but three in number. One of them, \$2,750, has stood since 1863; another, \$1,750, since 1864; and the other, \$2,433, since 1868. So that the executors have had but little trouble in making the investments. But the matter is not before me for review. The appeal from the decree allowing the account does not operate as an appeal from the order of January.

The other ground of appeal is, that the court did not charge Rarick with interest on \$200 of the sum of \$250, received by him January 6th, 1879. The \$250 appear, by the account, to have been paid in on the principal of the trust fund. Rarick paid \$50 of it to the widow. It does not appear that he invested it before he filed his account, or that he had any opportunity to do so, or that he made use of it himself. There is no evidence whatever on the subject. There does not appear to be any ground for charging him with interest upon it. But further, the exception was not made on this ground. It is simply an exception "to the item of \$250, collected on the principal of said estate." What the ground of objection is, cannot be gathered from the exception. It is fair to say that the objection, on the score of interest, which is made a ground of appeal, was not a ground of exception in the orphans court. It cannot, therefore, be entertained here. *Trimmer v. Adams*, 3 C. E. Gr. 505.

The decree appealed from will be affirmed, with costs.

Smith v. Pettigrew.

MOSES P. SMITH, appellant,

v.

OLIVER PETTIGREW, respondent.

In 1861, under the directions of a will, A and B, the executors thereof, invested \$4,000 in a mortgage, to pay the interest to C until C's son arrived at twenty-one, and then to pay the principal to him. The mortgage was taken in the name of both the executors. A borrowed moneys at various times afterwards of the mortgagor, on his own account, and, in September, 1875, credited the mortgagor, on the mortgage, with \$1,000, on account of those borrowed moneys. In February, 1878, B ascertained these facts, and inquired of A in regard to them, but took no further steps. C's son attained his majority in October, 1878.—*Held*, that B was liable for the \$1,000, A being insolvent; and that it was no ground of relief that the mortgage had, for convenience in collecting the interest, been left in A's hands, or that A's malfeasance had not been discovered until two years thereafter, and that A was said to have been then insolvent, or that A had voluntarily accounted alone in the orphans court, in 1875, for his administration of the fund, B having omitted to take the steps precautionary and protective which he might have taken in behalf of the trust estate in the premises.

On appeal from order of Essex orphans court.*Mr. William B. Guild, jun.*, for appellant.*Mr. F. A. Johnson*, for respondent.

THE ORDINARY.

David Jones, deceased, by his will, among other things, directed that \$4,000 of his estate be invested by his executors (Samuel M. Bailey and Moses P. Smith), and the interest paid to his granddaughter, Mrs. Pettigrew, until her son Oliver should have become of age, when the fund was to be paid to him. The executors raised the money in 1861 from the sale of

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the testator's real estate, and it was invested upon a purchase-money mortgage for the amount given to them as executors in the sale.

On October 4th, 1878, Oliver became of age. In September, 1875, Bailey borrowed money, in several loans, on his own account, from the mortgagor. The last loan was for about \$500. On the day the last-mentioned money was obtained, he, in payment of his debt to the mortgagor for borrowed money and interest thereon, receipted on the bond for \$1,000 of the principal. This was done at the request of the mortgagor, and it is not improbable that he lent Bailey the money on that day on the agreement that, in consideration of his doing so, he was to have the credit on the bond. Smith did not ascertain that the credit had been put on the bond until February, 1878. He then spoke to Bailey on the subject, and asked him where he had invested the money. Bailey refused to tell him, and said that it would be forthcoming when the time should come for paying it over to Oliver. Smith never took any action on the subject until Oliver became of age, and then only interested himself in assigning the mortgage to him. The orphans court, on petition of Oliver, ordered the executors to pay Oliver the \$1,000, and interest and costs. From that order Smith appealed. He insists that he is not liable, inasmuch as the bond and mortgage were left in Bailey's hands, in order that he might collect the interest and pay it over to Mrs. Pettigrew, who lived in the same village (Millburn) in which he and the mortgagor resided, and he himself was not aware of the misconduct of Bailey in receipting for the \$1,000 until over two years after it occurred; and, as he insists, Bailey was, when he became aware of it, insolvent, and ever since has so remained, and also seeing that Bailey, in 1875, accounted alone and as trustee in the Essex orphans court, for the trust fund and his administration thereof.

The bond and mortgage were, as before stated, given to both executors in 1861. They accounted jointly for the estate, and by their account as settled a balance of \$7,394.55 was in their hands. Of this money, Bailey paid to Mrs. Pettigrew \$3,394.55, pursuant to the directions of the will, and the \$4,000 were then

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invested on the purchase-money mortgage, as before mentioned. They were both, under the circumstances, responsible for the \$4,000 (*Laroe v. Douglass*, 2 *Beas.* 308), and the fact that Bailey subsequently filed his account as trustee of the fund does not relieve Smith from liability. Bailey's relation to the fund had not been changed by any judicial proceeding, and Oliver was within the age of consent. Smith lived but a very short distance—a few minutes' ride by the railroad—from Millburn. He does not appear to have made any inquiry about the fund from 1861 until, in 1878, he learned that Bailey had receipted for \$1,000 of it, and then it was at Oliver's request that he made inquiry of Bailey on the subject. Oliver requested him to ask Bailey how he had invested it, and he did so. When Bailey refused to tell him, he took no action whatever to compel an account.

It is the duty of one trustee to protect the trust estate from any misfeasance by his co-trustee, upon being made aware of the intended act, by obtaining an injunction against him; and if the wrongful act has been already committed, to take measures, by suit or otherwise, to compel the restitution of the property and its application in the manner required by the trust. *Hill on Trustees* *314; *Perry on Trusts* § 417; *Laroe v. Douglass*, 2 *Beas.* 308; *Crane v. Hearn*, 11 *C. E. Gr.* 378. Smith could and ought to have proceeded against Bailey under the 117th and 118th sections of the orphans court act. It by no means appears that if he had taken the measures which he might have taken to compel Bailey to make restitution, he would not have been successful. Bailey was in good credit when Smith discovered that he had receipted for the \$1,000 on the mortgage, and he continued to be so, and regarded himself as solvent, for some months afterwards. He filed a petition in bankruptcy in 1878, but it was not until six months after Smith learned that he had received the \$1,000. Smith does not appear to have inspected the bond and mortgage, while they were in the hands of his co-executor, from 1861 to 1878, and, as before stated, he appears to have made no inquiry about them. The \$1,000 were receipted for in 1875, and it was not until more than two years afterwards

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that he learned of it, and then it was not by any inquiry, but by information received from Oliver. He never so much as notified the obligor in the bond that no payment of principal was to be made without his express consent, but trusted implicitly to Bailey. Under the circumstances, he must bear the consequences. There is no error in the order appealed from. It will be affirmed, with costs.

STEPHEN O. SMITH, executor, appellant,

v.

EMMA L. BURNET, respondent.

1. On exceptions to an executor's account, the executor is not a competent witness, when he offers himself as a witness on his own behalf, to testify as to any transactions between himself and his testator.

2. Where stock stood in a testator's name on the books of the corporation, the facts that the certificate is found in the executor's possession, and that the testator gave him a power of attorney to receive and assign any scrip or dividend due him from the company, are not conclusive evidence of a gift of the stock to the executor.

Appeal from decree of Essex orphans court.

Mr. J. Frank Fort, for appellant.

Mr. George F. Tuttle, for respondent.

THE ORDINARY.

The question presented and discussed in this appeal is, whether the appellant, who is the surviving executor of his father, has established his title (by gift) to certain insurance company stock which his father owned, and which at his death still stood in his name on the books of the company. The respondent excepted

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to the appellant's account as executor, because he had not charged himself with the stock and the dividends thereon, and the orphans court, by order made April 4th, 1881, charged him therewith, and refused to allow him commissions, and ordered him to pay the costs of the exceptions, undoubtedly because they deemed his conduct, in claiming the stock as his individual property, fraudulent. They also, by another order made on the same day, adjudged that he had abused his trust, and failed to perform the duties required of him by law as executor, and revoked his letters testamentary and appointed another person administrator with the will annexed.

The court below refused to permit the appellant to testify as to the transactions between him and the testator in regard to the gift of the stock, or as to any statement of the testator on the subject. The appellant's counsel urges that under the 106th section of the orphans court act, the appellant was admissible as a witness in his own behalf, notwithstanding the prohibition of the third section of the act concerning evidence and the proviso of the supplement of 1880 to that act. The section of the orphans court act referred to provides that the court to whom any account is reported for allowance, or the auditors or masters to whom an account is referred, at the instance of any party interested in the account, or by their own proper authority, may examine the executor, administrator, guardian or trustee exhibiting such account on oath, or affirmation, touching the truth and fairness of the account or any part or item thereof. The 3d section of the act concerning evidence removes the disqualification of persons interested in suits or proceedings at law or in equity, from being witnesses therein, except where the opposite party is prohibited by any legal disability from being sworn as a witness, or either of the parties sue or is sued in a representative capacity, except where as provided in the next section. That section provides that a party to a suit in a representative capacity may be admitted as a witness therein, and if called as a witness in his own behalf, and admitted, the opposite party may, in like manner, be admitted as a witness. The supplement of 1880 (*P. L. of 1880 p. 52*) provides that in all civil actions in any court of law or

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equity of this state, any party thereto may be sworn and examined as a witness, notwithstanding any party thereto may sue or be sued in a representative capacity, provided that the supplement shall not extend so as to permit testimony to be given as to any transaction with or statement by any testator or intestate represented in the suit. The above-mentioned section of the orphans court act did not qualify the fiduciaries therein named to prove their own demands against the estates in their hands (*Pursel v. Pursel*, 1 *McCart*. 514, 525), but it made them compellable to testify if called in reference to their accounts, and made it the duty of the court to require them to testify at the instance of any other party interested in the account. *Davison v. Davison*, 2 *Harr*. 169. In the case in hand, the executor was not called by the court or any party interested in the account within the meaning of the act, but offered himself as a witness in his own behalf; and under those circumstances he was not competent to testify in his own behalf as to any transaction with or statement by the testator.

On the merits of the controversy, as proved by the competent testimony, the decree must be sustained. The proof is, that up to about the 1st of January, 1875, the testator (who lived and died in Newark) owned the stock in question, which was stock of the Newark Mutual Fire Insurance Company. He died on the 6th of March of that year. The stock stood on the books of the company in his name up to the 1st day of April following, when the executor transferred it to himself individually. Louisa B. Riker testifies that before the first of the month of January, 1875, and while the appellant was absent from the state, the testator, taking the scrip out of the box in which he kept it with his other valuable papers, told her that he was going to give that scrip to his son Stephen. She further says that the 1st of January, after Stephen had returned, the testator told her that he had given that scrip to Stephen, and she also says that he told her the same thing, she thinks, more than once before he died, and that he said that Mr. Henry, the secretary of the company, "would see about transferring the stock to Stephen." On the 7th of January, the testator signed and

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delivered to Stephen a writing by which he appointed Stephen his attorney to receive and assign any scrip or dividends due or belonging to him in the company, and to receive the interest thereon. Stephen did not transfer the stock under this power, but on the day of its date drew, as attorney of the testator, a dividend of \$45.45, of which \$35.40 were retained by the company for interest due on a mortgage of the testator held by it, and the remainder was paid over to Stephen. The power was such a one as was usual as an authority for merely drawing dividends by an attorney, and under such powers the company would make transfer in case of the known disability of the stockholder from sickness. But in other cases, a different paper was required.

There is no proof that the scrip was ever delivered to Stephen. He swears, indeed, that he had possession of it from the 7th or 8th of January, but that does not prove delivery to him in pursuance of a gift, and he is not competent to prove delivery. The delivery to and acceptance of the scrip by him is a most material part of the transaction. 2 *Kent's Com.* 438; *Betts v. Francis*, 1 *Vr.* 152. Louisa B. Riker testifies that she thinks she saw the scrip in the testator's box through January and February, 1875 (he died March 6th, 1875), after he had told her that he had given it to Stephen. The power of attorney before mentioned did not, in terms, authorize Stephen to transfer the stock to himself. It only authorized him, as the testator's attorney, to receive and assign the scrip or any dividends due or belonging to the testator in the company, and to receive the interest thereon. It did not in itself indicate an intention on the part of the testator to give the scrip to Stephen, or to part with the property. Had Stephen under it transferred the stock to himself, he would have been liable to account for it unless he could have shown, *aliunde*, a right to do so for his own benefit. It therefore is not evidence that the testator had given the stock to him. The fact that he did not transfer the stock to himself under it, but drew the dividend as attorney in fact of the testator, and applied part of it to the payment of the testator's debt to the company, is an important and significant circumstance

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also. His claim to the stock, then, rests upon the testimony of Louisa B. Riker, that the testator declared that he intended to give the stock to him, and afterwards, that he had given it to him. This, of itself, is not enough to support the claim of a gift *inter vivos*. For aught that appears, he may have changed his mind before his death. Until delivery and acceptance, there is *locus penitentiae* in such cases.

And, according to the testimony, notwithstanding these declarations, the testator kept possession of the scrip and never did any act from which the conclusion can be drawn that he in fact delivered it to Stephen, or assigned the stock to him legally or equitably.

The decree appealed from will be affirmed, with costs.

In the matter of the account of JOHN WOLFE, administrator *pendente lite* of the estate of Joseph L. Lewis, deceased.

The provisions of the statute on the subject of commissions of administrators, executors &c., and the duty of the court thereunder, considered. The fees of the administrator of a very large estate fixed and the reasons stated. Allowance for the compensation of an accountant employed by the administrator to keep and make up his account, refused.

Mr. R. Gilchrist and *Mr. C. Parker*, for the administrator.

Mr. A. Q. Keasbey, for the United States, principal legatee.

Mr. Russell, of New York, for contestants of will.

THE ORDINARY.

The subject of the allowance to be made to the administrator *pendente lite* of Joseph L. Lewis, deceased, for commissions, counsel fees to his counsel, and compensation to the accountant employed by him, is presented after full debate. The adminis-

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trator was appointed March 31st, 1877, and the will having been admitted to probate, he turned over the estate to the executors (of whom he is one) in or about June, 1880. The inventory amounted to \$1,018,669.70, and the increase was \$352,373.81. He claims that he is entitled to commissions to the amount of \$27,805.38, or, if not to so much, at least to the amount of \$27,180.50. The former sum is the amount to which he would be entitled at the rate which appears to have been allowed by this court to the administrator *pendente lite* of Henry Vanderveer, deceased. The latter sum is the amount to which he would be entitled if the allowance be made up to the limit fixed by the 110th section of the orphans court act (*Rev. 776*). He claims, also, \$2,500 counsel fees for one of his counsel, and \$5,000 for the other, for services and advice rendered and given to him in his administration. He also asks allowance for an accountant's bill of from \$500 to \$800, for services rendered in making up his account.

First, as to the amount of allowance to be made for commissions. The orphans court act (§ 110) provides that on the settlement of the accounts of executors, administrators, guardians or trustees, under a will, their commissions over and above their actual expenses, shall not exceed the following rates: On all sums not exceeding \$1,000, seven per centum; if over \$1,000, and not exceeding \$5,000, four per centum on such excess; if over \$5,000, and not exceeding \$10,000, three per centum on such excess; and if over \$10,000, two per centum on such excess; provided that the commissions of executors and administrators, in any estate where the receipts exceed the sum of \$50,000, shall be determined by the orphans court on the final settlement of their accounts, *according to the actual services rendered*, not exceeding five per centum on all sums which come into their hands. By the next preceding section it is provided that the allowance of commissions to executors, administrators, guardians or trustees shall be made with reference to their *actual pains, trouble and risk* in settling such estate, rather than in respect to the *quantum* of estate. The allowance of commissions, it will be seen, while it is in the discretion of the court, is subject to certain positive

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limitations, which cannot be exceeded, and also to certain admonitory provisions, by which the legislature intended still further to circumscribe the exercise of the discretion. It is provided that the amount to be allowed shall not exceed certain rates, and also that, in the exercise of the discretion, regard is to be had to what are the true grounds of compensation, trouble, risk and actual pains, rather than to the size of the estate. Courts are thus, as well as by the requirements of the due administration of justice, admonished that the mere fact that an estate is large, is not of itself a sufficient warrant for a large allowance to those to whom the law may have committed it for protection and management; but they are to have regard rather to the other more appropriate considerations—actual pains, trouble and risk. At the same time, it is equally due to the proper administration of justice, and therefore to the interests of society, that the remuneration should not be so meagre and unsatisfactory as to induce such as can render valuable services in the management of such trusts, and whose acceptance thereof is to be desired, to refuse to assume the care and responsibility. All such, however, should be satisfied with reasonable compensation. In fixing such compensation, the size of the estate, where there is responsibility for its protection, will, of course, not be left out of the account. So, too, where an administrator is required to give bond in a large sum, that fact should enter into consideration. In the case in hand, however, it was deemed to be impracticable to obtain a proper person to administer who would give a bond with the security required by law, in an adequate penalty. The applicant for letters was, as before stated, one of the executors named in the will. On the probate of the will, he, with his co-executor, would be entitled to the possession of the entire estate, without security. The ordinary deemed him, in all respects, a proper person to be appointed, but he was unable to give bond in conformity with the statutory requirement. The ordinary, therefore, in order to secure the estate and to justify the acceptance of such a bond as he could give, directed that the personal estate, which consisted of securities, all of which, with perhaps a comparatively insignificant exception, were government bonds

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and stocks, be placed on special deposit in the safe deposit of the Newark Savings Institution, under the control of the ordinary, and permitted the administrator to enter on the duties of his office on giving a bond in the sum of \$100,000 only.

The amount of compensation to be allowed will therefore not be materially affected by considerations flowing from the necessity of finding security to a large amount. By the means adopted as before mentioned, to obviate the difficulty created by the inability to obtain a proper person to administer who could give an adequate bond, the administrator was, to a very great extent relieved from risk in the keeping of the estate. And for so large an estate the actual trouble and pains required in managing it were comparatively small. Of the government securities, over \$38,000 were redeemed by the United States in June, 1877, over \$14,000 in October, 1878, and \$95,000 in March, 1879. Of the stocks, there were three thousand six hundred shares of the New York Central and Hudson River Railroad Company; four thousand and fourteen of the Delaware and Hudson Canal Company, and seven hundred and ninety-six of the New York Gas Light Company. Of these stocks, the whole of the New York Central and Hudson River Railroad Company stock was sold February 21st, 1879; the whole of the Delaware and Hudson Canal Company stock and the shares of the New York Gas Light Company were sold March 18th, 1879. There were also certificates of deposit of the United States Trust Company to the amount of about \$86,000. All those stocks were sold under the order of the court, and all the investments of the estate were made by like order, in government securities. The administrator collected about \$28,000 of interest on the coupons of the government bonds, and he received a large sum for dividends &c. It will be seen that he had none of the risk of investment and but little risk of safe keeping. In fixing the compensation, not much aid is to be derived from precedent. The allowance in each case must depend on the circumstances. The rate which appears to have been adopted in the *Vanderveer* case will furnish but little guide to what should be granted in this. In that case, the rate was, as before stated, one per cent. on the

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amount of the inventory, and five per cent. on the increase. I see no reason for making any such distinction in this case. Moreover, the great difference between the amount of the Vanderveer estate (about \$300,000) and the amount of this (over \$1,300,000) is to be taken into account. I am of opinion that one per cent. on the whole amount of the estate will be ample remuneration to the administrator for all his trouble, pains and risk in the entire matter. No allowance will be made for the compensation of the accountant. The administrator's fees must be presumed to cover his trouble and expenditure in making up his account. Nor is there anything in the case to justify the allowance. One of his counsel, Mr. Parker, will be allowed for all of his services to the administrator, including those rendered in the Benson suit, \$1,000; and the other, Mr. Gilchrist, will be allowed \$2,500, in full for all services and advice properly chargeable against the estate. He appears to have rendered some services to the administrator which are not chargeable against the estate, but which should be paid for by the administrator out of his own funds, they being such as the latter was bound to render for the compensation which his commissions afforded. The register of this court has no claim to commissions, except on the money paid into court and deposited by the administrator in the bank of the Trenton Banking Company, by order and in the name of the ordinary. He is obviously entitled to no commissions on the securities or the proceeds of the sale or redemption thereof. But he should be compensated for his services in attending upon the placing the securities &c. in the safe deposit, and the delivery and return thereof from time to time out of and to it. For all his services in connection with the property of the estate, he will be allowed \$250 in addition to his commissions on the money paid into court.

1

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY
AND PREROGATIVE COURT,
JUNE TERM, 1881.

SAMUEL BINGHAM, appellant,

v.

CHARLES KIRKLAND et al., respondents.

1. T. H. made a deed to L. H., in 1867, which was recorded. L. H. made a deed back to T. H., in 1868, which was never recorded. T. H. made a mortgage upon the same property to B., in 1871, which was recorded. Afterwards, L. H. made a second deed, purporting to convey again this property to T. H., in 1872. In 1874, T. H. made a mortgage to W. W. P.—*Held*, that the mortgage to W. W. P. was a superior encumbrance, the last mortgagee having no actual notice of the mortgage to B., or the deed to T. H., made in 1868.

2. Where one who has no title makes a mortgage, which is recorded, and subsequently acquires title, a subsequent purchaser is not chargeable, under our registry acts, with constructive notice of the mortgage.

3. The doctrine of title by an estoppel binding the second mortgagee, cannot be invoked in this case by B., inasmuch as T. H. already had title when he gave the mortgage to B., and the second deed to T. H. was nugatory

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4. T. H. was in possession of the premises before he made his deed to L. H., in 1867, and remained in possession down to the time of making the mortgage to W. W. P., in 1874.—*Held*, that his possession was not notice to W. W. P. of the title of T. H., under the unrecorded deed of 1868, so as to require W. W. P. to search against the acts of T. H. from that time.

5. When a vendor remains in possession after making his deed, a purchaser from his grantee has a right to rely upon the deed of the vendor in possession, as a complete answer to any inquiry which his possession would suggest.

6. The possession which suggests inquiry to a purchaser, and is notice to him of the possessor's interest in the land, is a possession existing at the time of the purchase.

This is an appeal from an order advised by Vice-Chancellor Van Fleet dismissing a cross-bill.

It is a decree in a suit originally brought by Charles Kirkland, trustee of Catherine A. Mower, to foreclose a mortgage upon forty acres of land in Bergen county, made by Thomas Howland and wife to Catherine F. Dana, and by her assigned to Kirkland.

In the course of this suit, a conflict arose as to the relative positions of two mortgages upon a part of the property covered by the Kirkland mortgage.

One of these mortgages was made by Howland and wife upon six acres of the forty-acre tract, to a Mr. Bailey, who assigned it to Bingham. The other mortgage was made by Howland upon five and a-half acres of the six acres aforesaid, to William Walter Phelps. The original suit was arrested at this point of its progress, until Mr. Bingham could file his cross-bill to determine the question raised as to the priority of these encumbrances. In the bill so filed by Mr. Bingham, he prays that his mortgage, as to the execution and record thereof, may be decreed to be prior in time to the mortgage to Mr. Phelps, and that the complainant may be entitled to priority of payment out of the proceeds from the sale of the mortgaged premises. The admitted facts which appear in the cause, and upon which the question of the relative positions of these instruments rests, are as follows :

Howland, who subsequently made both these mortgages, in

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1867 made a deed of the premises afterwards mortgaged to one Louisa Hudson, which deed was duly recorded.

In 1868, Louisa Hudson reconveyed the subsequently mortgaged premises to Howland, but this deed back to Howland was never recorded.

In July, 1871, Howland, having never recorded this deed back to him, made the mortgage now held by Mr. Bingham, which was recorded in August, 1871.

For some reason, Louisa Hudson, after having conveyed back the property to Howland by the deed of 1868, which was not recorded, made a second deed, in August, 1872, of the mortgaged premises to Howland. After this, in May, 1874, Howland made the mortgage to Mr. Phelps.

On the point that the respondent's mortgagors are estopped to deny their own title, *Mr. S. B. Ransom* cited—

2 *Smith's Lead. Cas.* (5th Am. ed.) 581, note; *Decker v. Caskey*, 2 *Gr. Ch.* 446; *Kellogg v. Wood*, 4 *Paige* 578.

That a party claiming through another is estopped by that which estopped that other, respecting the same subject matter. 2 *Smith's Lead. Cas.* (5th Am. ed.) 589, note; *Taylor v. Needham*, 2 *Taunt.* 282; *Trivian v. Lawrence*, 1 *Salk.* 276; *Rawlins's Case*, 4 *Coke* 52; *Weale v. Lower*, *Polexf.* 61; *Fairbanks et al. v. Williams*, 7 *Greenl.* 96; *Carter v. Chandron*, 21 *Ala.* 72; *Rigg v. Cook*, 4 *Gilman* 348; *Jarvis v. Aikens*, 25 *Fl.* 635; *White v. Patten*, 24 *Pick.* 324; *Johnson v. Watts*, 1 *Jones (N. C.)* 228; *Bank of Utica v. Messereau*, 3 *Barb. Ch.* 567; *Douglas v. Scott*, 5 *Ohio* 198; *Bailey v. Trustees of Lincoln Academy*, 12 *Miss.* 177; *Philly v. Sanders et al.*, 11 *Ohio (N. S.)* 490.

That possession was sufficient notice to put respondent on inquiry. 4 *Kent's Com.* 179, 7th ed. and notes; *Tuttle v. Jackson*, 6 *Wend.* 213, 226; *Wright v. Douglass*, 10 *Barb.* 97; *Troup v. Hurlbut*, 10 *Barb.* 354; *Merritt v. Northern R. R. Co.*, 12 *Barb.* 605; *Fraze v. Weston*, 1 *Barb. Ch.* 220, 232; *Colby v. Kenniston*, 4 *N. H.* 262; *Norcross v. Widgery*, 2 *Mass.* 508; *Eyres v. Dolphin*, 2 *Ball & B.* 301; *McMahon v. Griffing*, 3 *Pick.* 149; *Malpas v. Ackland*, 3 *Russ.* 273; *Bellington v. Welch*, 5 *Binn.* 129; *Davis v. Blunt*, 6 *Mass.* 487; *Johns v.*

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Norris, 12 C. E. Gr. 485; *Howard Ins. Co. v. Halsey*, 4 Sandf. S. C. 573; *Pendleton v. Fay*, 2 Paige 202.

The law of estoppel makes mortgages on lands acquired after their execution, a lien on said lands, and he was just as much bound to search for such liens as for judgments. *Warburton v. Meattoz*, *Morris (Iowa)* 367; *Jarvis v. Aikens*, 25 Vl. 635; *White v. Patten*, 24 Pick. 324; *Philly v. Sanders*, 11 Ohio (N. S.) 490; *Tefft v. Munson*, 57 N. Y. 97.

Mr. G. H. Coffey, for respondents.

Bingham's mortgage is not a lien, because Phelps had no notice, actual or constructive. 1 *Story Eq. Jur.* (4th ed.) 396-412; *Brown v. Volkening*, 64 N. Y. 76.

Bingham's mortgage, when recorded, was not a conveyance, and not until the mortgagor took title as between the parties and not as to third parties till they had notice, actual or constructive. *Gillig v. Maass*, 28 N. Y. 213; 4 *Kent Comm.* 2d ed. 174; 1 *Story's Eq. Jur.* 404; *Boyd v. Mundorf*, 3 *Stew. Eq.* 345.

Phelps had a right to rely on the record as showing the truth, having no other notice. 1 *Story's Eq. Jur.* 403.

A mortgage recorded before the mortgagor has title is void, and is no notice to subsequent *bona fide* purchasers. *N. Y. Life Ins. Co. v. White*, 17 N. Y. 469; *Cook v. Travis*, 20 N. Y. 400; 1 *Story's Eq. Jur.* 396, 397; *Losey v. Simpson*, 3 *Stock.* 246; *Neligh v. Michenor*, 3 *Stock.* 534-5; *Lathrop v. Groten Savings Bank*, 3 *Stew. Eq.* 126, 4 *Stew. Eq.* 273.

Mere possession not visible or actual is not a requisite notice. *Cogswell v. Stout*, 5 *Stew. Eq.* 240; *Losey v. Simpson*, 3 *Stock.* 246; *Lathrop v. Groten Savings Bank*, 4 *Stew. Eq.* 273; *Brown v. Volkening*, 64 N. Y. 76; *Cook v. Travis*, 20 N. Y. 400; *Page v. Waring*, 76 N. Y. 463; *Tefft v. Munson*, 57 N. Y. 97.

The opinion of the court was delivered by

REED, J.

The question which presses for solution is relative to the construction of our registry acts in regard to their effect upon the rights of these two mortgagees.

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The mortgagor, after making a deed from himself to Hudson, which was recorded, and after receiving a deed back to himself, which was not recorded, gave the Bingham mortgage, which was recorded.

After this, he took a second deed from Hudson of the mortgaged property, and afterwards gave the mortgage to Phelps.

It is apparent that at the time when Bingham took his mortgage, the records would have disclosed to a searcher that Howland, who made it, had parted with his title in the premises in 1867, and no deed back to him would have appeared.

So far as Mr. Phelps knew, no title had been reconveyed to Howland until 1872, when the second deed from Hudson to Howland was made, and upon which title deed the loan was made by Mr. Phelps in 1874.

Between 1867 and 1872, then, so far as appeared by the record taken in connection with the deed of 1872, of which Phelps had notice, the title to the mortgaged premises was in Hudson and not in Howland. Between those dates the mortgage had been made by Howland which is held by Bingham, and it had been recorded.

A search, therefore, against the owners of the mortgaged premises during the period when each appeared to have had title, would not have disclosed to Mr. Phelps the existence of the Bingham mortgage.

The counsel for Mr. Bingham contends that although Mr. Phelps had notice of no reconveyance to Howland previous to 1872, and the Bingham mortgage was made previous to that time, yet that being so made and recorded, the deed of 1872 operated to feed an estoppel created by the Bingham mortgage.

The familiar rule invoked is that where one without title conveys with covenants of warranty and subsequently acquires title, he is concluded from asserting that at the time of his conveyance he had no right to make the conveyance. The deduction by appellants' counsel is, that Howland is estopped, by the fact of receiving the deed of 1872, from asserting that he had not title when the Bingham mortgage was made and recorded, and that Phelps, as his privy in estate, is equally bound by the estoppel.

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In support of this position there are cases cited in which it has been held that a mortgage made by a person without title, and recorded, is a superior lien upon the property as against a mortgage made by the mortgagor after he acquired title. One of these cases is that of *White v. Patten*, 24 Pick. 324, in which case the result is reached upon the ground that the second mortgagee is in privity of estate with the mortgagor, and therefore bound by the estoppel which existed against the mortgagor himself, who had subsequently acquired title.

In the opinion, however, the effect of the registry laws is not mentioned, and the case is treated as involving the doctrine of estoppel only.

The case of *Jarvis v. Aikens*, 25 Vt. 635, is decided upon the authority of *White v. Patten*, *supra*.

If the facts in the present case were exactly similar to those in the above and other cases cited in support of the doctrine ruled therein, I could not assent to the result announced.

It would involve a construction of our registry acts which has never obtained in this state.

It would involve a search against every person whom the title in its transmission had ever touched, not merely for the period during which such person held the title, but for a period anterior thereto during which any encumbrance might have been made and still exist. Such a construction of the scope of the constructive notice imputed to a subsequent purchaser by our recording acts, is opposed to the sentiment of the bar of this state as it has existed from the earliest period of their enactment. The system of searching practiced, so far as I know or have been informed, without any deviation, has been to trace the line of record title and search against each owner during the period that he held the title. The titles to the real estate in the state rest upon searches made in conformity to this view.

And it is a sensible view. No one is supposed to convey or incumber property which he does not own. *Non dat qui non habet*.

A person would therefore naturally fail to inquire what some person had done about a property in which he had no interest.

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The doctrine of estoppel is based upon the equity of holding a person to the truth of his assertion so far as to prevent an injury which a permitted assertion of its falsity would entail. I am unable to perceive how it can equitably be enforced in a case like this we are considering. When a mortgagee is so negligent as not to require a chain of record title in his mortgagor, by means of which neglect a second mortgagee is induced to loan money, oblivious of the first encumbrance, it would be a mistake to allow such a doctrine to aid the negligent first mortgagee at the expense of a third person without actual notice.

This view receives the support of the supreme court of Pennsylvania in the case of *Calder v. Chapman*, 52 Penna. St. 359.

The method of searching which obtains in this state is, as appears by the citations in the opinion in that case, the system which is recognized and practiced there.

The same view was expressed by Chancellor Walworth in the case of *Farmers Trust and Loan Co. v. Mallby*, 8 Paige 361.

It also receives the approval of Judge Hare, in his notes to the case of *Le Neve v. Le Neve*, *Lead. Cas. in Eq.* (4th Am. ed.) vol. II p. 211, 212.

But I do not perceive how the appellants can invoke the doctrine of estoppel at all, in this case. Howland did not get title by the deed of 1872. He already had title by the previous deed of 1868. When he made the Bingham mortgage he had title, and therefore the subsequent deed was nugatory, as it purported to operate upon land the title of which had actually passed from the grantor to the grantee.

The last deed, therefore, conveyed nothing to feed the estoppel.

I find nothing in this branch of the case which deprives Phelps of the position of a mortgagee without notice of the Bingham encumbrance.

The counsel of the appellant contends, also, that the possession of the mortgaged premises by Howland had been such as to give Phelps constructive notice of such interest as Howland actually had in the premises. That this would have warned him of the deed to Howland, made in 1868, and so have compelled a search against Howland as the owner from that time,

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which search would have led to the discovery of the Bingham mortgage.

There are a variety of obstacles in the way of an adoption of this view.

First, it is stated in the bill, and in the brief of appellant's counsel insisted upon as a proven fact, that Howland had possession of the property at the time when he made the deed to Louisa Hudson, in 1867, and that he never lost, and that she never took possession of the premises.

Howland's possession, therefore, was one existing at and subsequent to the deed by which he conveyed all his interest to her, down to the time when he made the mortgages in question.

The inquiry which such possession would have suggested was answered by the record. The answer was, that he had no interest in the property, but had conveyed a fee to Louisa Hudson. That answer, a subsequent purchaser had the legal right to rely upon as correct. *Van Keuren v. Central R. R. Co.*, 9 Vr. 165; *Newhall v. Pierce*, 5 Pick. 450; *Scott v. Gallagher*, 14 Serg. & R. 333.

Again, the possession which is claimed to be notice to Phelps was the possession of Phelps's mortgagor, and not that of a third person. The doctrine of notice from possession arises from the notion that possession is *prima facie* seizin.

When a person dealing with a presumed owner, discovers that the possession which naturally follows and co-exists with ownership is openly in some third person, the inquiry naturally is suggested, By what right is he there? Upon his failure to make the inquiry, a purchaser is chargeable with knowledge of the interest of such possessor.

But the possession of the owner is consistent with the fact that he claims to be the owner.

It is not notice that he has burdened his land or conveyed away his title, or that his title is different from what he claims. The purchaser gets what he has, and no more, without regard to his possession. Nor was the possession of the grantor two years before the making of the Phelps mortgage, and before the deed

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of 1872, any notice to Phelps that he then held possession by some other title.

A purchaser is not bound to run back through the entire line of grantors, and inquire what the rights of any other person who may have been at any time in possession, may have been. The possession which is notice, is one existing at the time of the purchase. The abandonment of possession previous thereto is a presumptive determination of the right by which it was held.

The possession of Howland, at the time the Phelps mortgage was made, was consistent with the deed of 1872, and upon the deed Phelps had a right to rely.

In no way can I see how Phelps was affected by Howland's possession.

The result is, that Phelps took his mortgage without notice of the mortgage held by the appellant, and it has priority over the last-mentioned instrument.

The decree dismissing the cross-bill of Bingham is affirmed.

Decree unanimously affirmed.

THOMAS ALDRIDGE, appellant,

v.

SARAH J. MCCLELLAND, respondent.

1. Upon the removal of an executor, it is his duty to immediately deliver to the administrator with the will annexed, appointed in his stead, all goods and chattels, moneys and effects, in his hands, belonging to the estate.

2. That part of the 130th section of the orphans court act, which directs that the removed executor shall settle his account at the next term of the court, and pay over the balance to his successor within sixty days, is not inconsistent with that part of the same section, which directs that he shall immediately after removal, deliver the moneys then in his hands.

3. The object of the statute is at once to get all the property of the estate out of the hands of the removed executor, and transfer it to his successor, who has given bond, and this applies to moneys which it is ascertained by his admission, or otherwise, he holds.

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4. Should it happen that, on final settlement, there be money required to pay debts or costs of settlement, the administrator with the will annexed will be ordered by the orphans court to pay the same.

On appeal from a decree of the prerogative court.

Thomas Aldridge, the appellant in this cause, was, in the last will and testament of Richard Parkes, deceased, constituted and appointed by the testator as the executor thereof, and clothed with certain powers and trusts as therein stated &c. Said Aldridge was duly qualified as such executor upon the probate of said will before the surrogate of the county of Essex, and assumed the duties of his office. It appears that, on the 12th day of February, 1878, an order was made by the Essex orphans court requiring said Thomas Aldridge, as such executor, to give bond, with securities, in the sum of \$6,000, to the ordinary &c., for the faithful performance of his duty under the said will. It appears, also, that from said order to give bond &c., an appeal was taken by said Aldridge to the prerogative court, and that, upon the hearing of said appeal, the said order of the orphans court was affirmed by the prerogative court.

It appears that thereupon an appeal was taken by said Aldridge from said order of affirmance to this court, and that his said appeal was dismissed by this court, and that thereupon the matter was regularly remitted to the said orphans court, on April 29th, 1879. It further appears that, on May 20th, 1879, an order was made by the said orphans court upon the said Thomas Aldridge, that he show cause to the said court, on June 3d, 1879, why the letters testamentary issued to him as such executor should not be revoked and he be removed from his said office as such executor, for failure &c., to give said bond as aforesaid. It also appears that, on May 21st, 1879, the said Thomas Aldridge filed with the surrogate of Essex county his intermediate account as said executor, showing a balance in his hands of \$1,880.47, less \$6 paid for advertising settlement, and less also the sum of \$17.80, paid surrogate for expenses on said ac-

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count, leaving actually in his hands the sum of cash, \$1,856.67. It also appears, from his said account, that all the moneys so as aforesaid in his hands are moneys received by him from the sale of real estate made by him under the powers and trusts of said will. It also appears that, on July 8th, 1879, the said Aldridge having failed to give bond as aforesaid, the said order to show cause, of May 20th, 1879, was made absolute by the said orphans court, and an order was thereupon made by the said court "that the letters testamentary heretofore issued to the said Thomas Aldridge, as such executor as aforesaid, be revoked, and that said Thomas Aldridge be removed from his office as such executor, and that Elwood C. Harris be appointed administrator *de bonis non cum testamento annexo* of Richard Parkes, deceased." It also appears that the said order, made as aforesaid on July 8th, 1879, having been served upon said Aldridge, the said court did, on July 15th, 1879, make order upon the said Aldridge to pay over &c., to said Elwood C. Harris, administrator &c., as therein recited. And this order of July 15th, made as aforesaid, is the order upon which the appeal from said orphans court to the prerogative court was taken, from so much thereof as orders "that the said Thomas Aldridge immediately deliver over to the said Elwood C. Harris, as such administrator *de bonis non* &c., the sum of eighteen hundred and eighty dollars and forty-seven cents, the amount which the said Thomas Aldridge admitted was in his hands as such executor."

And the said prerogative court having affirmed the said order of the said orphans court in all things, with costs, and having ordered that the record be remitted to said orphans court, thereupon the said Thomas Aldridge appeals from the said prerogative court to this court.

Mr. Theodore Ryerson, for appellant, cited—

Griffith v. Beecher, 10 Barb. 432; 2 Wms. on Exrs. 1496; 1 Wms. on Exrs. 579; 1 Sugd. on Powers 128; *Doe v. Shotton*, 8 Ad. & El. 905; *Dabney v. Manning*, 3 Ham. 321; *Haskell v. House*, 3 Brev. 242; *McDonald v. King*, Coxe 432; *Aston's*

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Estate, 5 Whart. 228; 1 Watts 370; *Ross v. Barclay*, 18 Pa. St. 179; 2 Wms. on Exrs. 865, note 1; *Neal v. Hagthorp*, 3 Bland 557; *Potts v. Smith*, 3 Rawle 361; *Bell v. Speight*, 11 Humph. 451; *Swink v. Snodgrass*, 17 Ala. 653; *Conklin v. Egerton*, 21 Wend. 430, 450; 25 Wend. 224, 242; *Brush v. Young*, 4 Dutch. 242; *Howell v. Sebring*, 1 McCart. 84.

Mr. John Whitehead, for respondent, cited—

Rev. 781 §§ 129-30; *Meakings v. Cromwell*, 1 Seld. 139-40; *Chambers v. Tulane*, 1 Stock. 146, 157; *Matter of Anderson*, 5 N. Y. Leg. Obs. 302; *Zebach v. Smith*, 3 Binn. 69; *Peter v. Beverly*, 10 Pet. 533-565; 4 Kent Comm. (10th ed.) 589-599; *Davon v. Fanning*, 2 Johns. Ch. 254; *Bogert v. Hertell*, 4 Hill (N. Y.) 497; *Sugd. on Powers* 160-165; *Powell on Devises* 197; *Farwell v. Jacobs*, 4 Mass. 636; *Conover v. Hoffman*, 1 Bosw. 214.

The opinion of the court was delivered by

PARKER, J.

On the 22d day of October, 1872, Richard Parkes, of Bloomfield, N. J., executed his last will, in which he appointed the appellant his executor.

After the will was probated, such proceedings were had in the orphans court of the county of Essex that, on the 12th day of February, 1878, an order was made requiring the appellant to enter into bond as such executor, with sureties, in the sum of \$6,000, on or before the 19th day of the same month.

There was an appeal from that order, but the prerogative court affirmed it, and upon further appeal to this court, the decree of the ordinary was affirmed.

The appellant having failed to obey the order of the orphans court requiring him to give bond, on the 20th day of May, 1879 a rule was entered, directing him to show cause, on the 3d day of June then next, why the letters testamentary which had been issued to him should not be revoked.

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The appellant still refusing or neglecting to give bond, on the 8th day of July, 1879, the orphans court made an order removing him from the executorship, and appointing Elwood C. Harris in his stead as administrator *de bonis non cum testamento annexo*.

A few days before the order of removal was entered, the appellant filed in the office of the surrogate an account of his receipts and disbursements as executor. In this statement of account, which was made under oath, the appellant acknowledged that there was in his hands, as executor of Richard Parkes, deceased, and belonging to the estate, a balance of \$1,880.47.

The newly appointed administrator, having qualified, perfected his bond, and entered upon his duties. The orphans court, on the 15th day of July, 1879, made an order that the appellant immediately deliver to Elwood C. Harris, his successor, the said sum of \$1,880.47 (the amount he admitted to be in his hands), with the qualification embodied in the order that such delivery should be without prejudice to him, or to the several parties who might appear to be interested in the final settlement.

From the order last named the appellant appealed to the prerogative court, where it was affirmed, and this decree of the prerogative court is now brought by the appellant to this court for review and adjudication.

The chief reason urged for reversal is grounded on the assumption that the appellant held the money in question, not as executor, but as trustee, and it is said that not having been removed as trustee, the orphans court had no power to order him to deliver such trust money to the administrator with the will annexed.

Whether this would be a good reason for reversal, if the facts supported it, it is not necessary to inquire.

The will of Richard Parkes does not bear the construction contended for by the appellant. After devising certain lands to the respondent in fee, and the use of other lands for her natural life, the testator directs the executor to sell the residue of his

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real estate, and pay over the proceeds. He does not authorize the holding of the proceeds in hand, in trust for any object. The will gives no more than the ordinary naked power to an executor to sell lands.

Nothing is to be done with the estate which the administrator with the will annexed cannot do.

The 129th section of the orphans court act (*Rev. 781*), and the 11th section of the "Act concerning executors and the administration of intestates' estates" (*Rev. 398*), confer on the successor of a removed executor all the powers such executor originally possessed for the administration and settlement of the estate.

From an examination of the account filed by the appellant in the surrogate's office, it is evident that he considered that he held the moneys in his hands as executor for the purposes of the estate, and not as trust-moneys. He first charges himself with the amount of the inventory and appraisement (\$1,105), and the only other item on the debit side is for moneys received from sale of lands (\$3,631.50), making a total of \$4,736.50.

He then prays allowance for debts paid out of this common fund (\$2,856.03), leaving in his hands a balance of \$1,880.47. In no part of the account does it appear that the appellant claimed to hold any part of the moneys on any special trust. The funds derived from the personal and from the real property are intermingled in the account, and together produce (after payment of debts) the balance he was ordered to deliver to his successor, and which the account states he holds in his hands as executor.

The next reason urged for the reversal of the decree is, that proceedings were commenced in the United States circuit court, under which an injunction was obtained by some of the legatees, forbidding the appellant disposing of any of the moneys. This question was not raised in the orphans court, and there is no evidence here of the facts alleged. Before the pretended proceedings were instituted, the orphans court had taken jurisdiction, and has never been ousted of such jurisdiction. It is also said that the order appealed from was made *ex parte* and without notice to the appellant, and therefore is illegal. Inasmuch as

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this objection was not raised by the petition of appeal to the prerogative court, it is not properly before us.

But supposing the question properly raised here, how does it appear that the appellant was not present when the order was made? He had been served with a rule to show cause why his letters should not be revoked. It was his duty to be present on the return of that rule. No cause being shown to the contrary, he was removed. The inevitable legal consequence of the removal was the order to deliver the property to his successor as soon as he was qualified. In fact, the order to deliver over is properly part of the order of removal of the application for which the appellant had notice. Until the contrary appears, he is presumed to have been present. So long as the order of removal stands, the direction to deliver over is by statute a necessary consequence which cannot be avoided, whether present in court in person or not.

The language of the 130th section of the orphans court act (*Rev. 781*) is imperative. It provides that upon the removal of an executor he shall *immediately thereafter deliver over* to the newly appointed administrator with the will annexed all goods and chattels, *moneys* and effects &c., which he shall hold. It will be observed that moneys are included among the property to be delivered.

In this case the sum of money belonging to the estate in the hands of the executor, had been ascertained by the admission of the appellant. It was not only lawful, but eminently proper, for the orphans court to direct its immediate delivery by the removed executor to his successor. His duties as executor were at an end. His power to pay the money to the parties interested in the estate was gone. It was in his hands, without security for its safe custody. His successor had given bond, and had power to dispose of the fund as fully as if he had been the original executor. It was the duty of the court, in such case, to see that the money was at once transferred. In no other way could the court protect the persons interested in the estate. The executor had refused to give security, had disregarded the decrees of the court, was liable to attachment for contempt, had been re-

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moved, and if the court had, under these circumstances, omitted to make the order appealed from, not only the spirit, but the letter of the statute would have been violated. Courts cannot be too vigilant and prompt in using all the means the law has provided in dealing with executors and administrators who have been adjudged derelict.

The provision of the 130th section of the orphans court act, which directs that the removed executor shall settle his account at the then next term, and within sixty days pay the balance, is not inconsistent with that part of the same section which directs that he shall, immediately after removal, deliver over the moneys then in his hands. The object of the law is to get out of the hands of the removed executor all property it is then ascertained he has, and if, upon settlement of the account subsequently, it shall appear he still has a balance, to have him deliver that also to his successor. If it should appear, at the settlement, that the removed executor had, by mistake, delivered over too much money, the orphans court would direct the administrator with the will annexed to refund the same. It was for that reason, that in this case the clause "without prejudice &c." was added to the order.

It is further objected that the order directs the delivery of too large a sum of money, because \$23.80 will be required to pay surrogate's and court's fees on settlement of the final account, which should have been deducted.

This objection was not taken in the petition of appeal to the prerogative court, and is now interposed for the first time. The sum directed to be delivered over was taken from the executor's statement; but if it should appear, on the settlement, that the surrogate and court have not been paid, the administrator with the will annexed should be directed by the orphans court to pay them.

Upon examining the items of the account filed in the surrogate's office, it appears that there was a larger sum belonging to the estate in the hands of the executor, at the time of his removal, than he was ordered to deliver. He prays allowance for \$219.46 as commissions. The 113th section of the orphans court

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act (*Rev. 776*) expressly provides "that a removed executor forfeits his commissions and all compensation for his services."

The decree of the ordinary is affirmed, with costs.

Decree unanimously affirmed.

PETER W. MELICK, appellant,

v.

CHARLES H. DAYTON, respondent.

CHARLES H. DAYTON, appellant,

v.

PETER W. MELICK, respondent.

1. The question of abatement from amount of mortgage, on account of deficiency in contents of the premises, may be raised by the mortgagor in foreclosure proceedings, by answer.

2. If a vendor fraudulently represents the number of acres, and thereby induces the vendee to pay more for the premises than he otherwise would, an abatement will be allowed.

3. There will also be abatement where there is gross mistake.

4. Gross mistake is where the quantity of land conveyed falls so far short of the quantity represented as clearly to warrant the conclusion that the grantee would not have contracted had he known the truth.

5. If the description in the deed calls for "more or less," and the quantity falls short or overruns a little, compensation will not be allowed, in the absence of fraud.

6. Mere enumeration of quantity at the end of a particular description of the premises, where there is no fraud nor gross mistake, is matter of description only, and not of the essence of the contract, and in such case there will not be deduction from the mortgage.

On appeal from a decree of the chancellor, whose opinion is reported in *Dayton v. Melick*, 5 *Stew. Eq.* 570.

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Mr. John T. Bird, for Peter W. Melick, cited—

Bigelow on Fraud 17, and cases cited; *Hill v. Buckley*, 17 Ves. 394; 1 *Story's Eq. Jur.* 779, and cases cited; *Reed v. Cramer*, 1 Gr. Ch. 277, 286; *Couse v. Boyles*, 3 Gr. Ch. 212, 216, 217, 218; *Sugden on Vend.* *370; *Shovel v. Bogan*, 2 Eq. Cas. Abr. 688; *Clark v. Carpenter*, 4 C. E. Gr. 328; *Weart v. Rose*, 1 C. E. Gr. 290, 297; *Belknap v. Sealy*, 14 N. Y. ; 1 *Story's Eq. Jur.* 141; *Murdock v. Gilchrist*, 52 N. Y. 242.

Mr. A. A. Clark, for Charles H. Dayton, cited—

4 *Kent Comm.* 467; *Mann v. Pearson*, 2 Johns. 37; 2 *Wash. on Real Property* 630; *Andrews v. Rue*, 5 Vr. 402; *Weart v. Rose*, 1 C. E. Gr. 297.

The opinion of the court was delivered by

PARKER, J.

Charles H. Dayton filed a bill to foreclose a mortgage given him by Peter W. Melick. The bond to secure which the mortgage was given, was for part payment of purchase-money of a mill-seat and tract of land, which Dayton conveyed to Melick.

Melick admits the execution of the bond and mortgage, but alleges he does not owe thereon as large a sum as is demanded in the bill of complaint.

He insists, *first*, that Dayton has not given him credit for all the payments he has made on the bond; and, *secondly*, that Dayton, at the time of the sale, misrepresented the contents of the tract of land, and he claims abatement from the mortgage equal to the value of the deficiency.

The chancellor did not allow any payments except those endorsed on the bond, and from this part of the decree Melick appeals.

The chancellor found that the premises conveyed contain four and forty-hundredths acres less than Dayton represented the con-

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tents to be, and directed the sum of \$572 to be deducted from the mortgage as the value of the deficiency in the number of acres.

From this part of the decree Dayton appeals.

The question of alleged payments not credited on the bond, will first be considered.

In his answer, Melick claims but two credits not endorsed, viz., a check for \$400 on February 5th, 1869, and a check for \$675 on or about April 1st, 1871.

Before Melick can be credited with these amounts, he must prove not only that they were paid, but that they were paid on the bond. This he has failed to do.

Melick paid for the premises, by passing over various securities to Dayton, and it clearly appears from the evidence that, after the assignment of said securities, and the execution of the mortgage in question, there remained due to Dayton \$779. For that amount Melick gave Dayton his note. Dayton swears that the check for \$400 was paid on that note, and not on the bond, and his statement is corroborated. The bond and mortgage were given on the 17th of December, 1868, one-half payable on the 1st of April, 1870, and the residue on the 1st of April, 1871, with interest from the 1st of April, 1869, and the \$400 check is dated the 5th of February, 1869. At the time this check was given, no part of the principal or interest of the mortgage was due. In fact, interest on the mortgage had not commenced to run. A payment made less than two months after the bond and mortgage were given, would undoubtedly be on the note, which was for part of the purchase-money, and therefore should not be credited on the bond.

Nor does the testimony support the allegation of Melick, that the check for \$675 of April 1st, 1871, was paid on the bond. It appears that there were other dealings between the parties. Dayton held a bond and mortgage given by one Apgar, which were among the securities assigned to him by Melick in payment for the mill-seat and tract of land. Dayton foreclosed the Apgar mortgage, and at the sheriff's sale Melick purchased part of the premises. Upon settlement of that transaction, a note of Melick

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for \$430.55 was passed over to Dayton. About the 1st of April, 1871, Melick paid off this note by giving Dayton the check for \$675. Dayton gave up the note to Melick, and on the 5th of April, 1871, credited the balance of the check, \$246.65, on the bond.

Another credit, not claimed in the answer, is insisted upon by Melick in the testimony. It appears that a check for \$185 was given by Melick to Dayton in August, 1870. Of this, Dayton did credit \$182 on the bond, but because the amounts of the check and the endorsement on the bond are slightly different, Melick claims credit a second time. The explanation is, that \$3 of the check were due Dayton for professional services, leaving the \$182 to be endorsed on the bond, which was done.

That all these checks were appropriated as Dayton says, and no further endorsements should be made on the bond, is conclusively demonstrated by what occurred at the interview between the parties on the 27th day of March, 1872. On that day they met at Melick's house. The bond was there, and the endorsements thereon examined. It will be observed that this was long after the date of any of the alleged disputed payments on the bond. On that occasion, Melick did not pretend that he was entitled to any credits on the bond other than those endorsed thereon. It appears that Melick had intended to pay \$600 on the bond on that day, but he did pay \$634.17. It also appears, from the evidence, that this odd sum was paid, so as to reduce the bond to exactly \$4,500, which both parties agreed was then due. And at the end of another year, March 28th, 1873, Melick paid \$315, which was the precise amount of interest due on \$4,500.

Here was a settlement as to the amount due on the bond, at a time subsequent to the pretended payments not endorsed. If there had been other payments on the bond that should have been credited thereon, would they not then have been claimed by Melick?

He is concluded upon this question by that settlement, and the chancellor did right in not allowing him any payments on the bond except those already endorsed thereon.

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It remains to consider the claim of Melick for abatement from the mortgage on account of alleged deficiency in the number of acres. He says Dayton represented that the tract contained about ninety-seven acres, when, in fact, the deed conveyed only about eighty-seven acres. The evidence, however, shows that there was a deficiency of only four and forty-hundredths acres, and so the chancellor found.

Should any deduction be made from the mortgage in this case on account of such deficiency? Whatever difficulty there may be in answering this question, arises from the contradictory nature of the testimony, rather than from doubt as to the principles which govern.

Before referring to the evidence, it will be well to state briefly some conclusions which the courts have enunciated on this subject. There is no doubt that the question of abatement can be raised by a mortgagor, by answer in foreclosure proceedings, and under certain states of facts, deduction from the mortgage will be ordered to the extent of the value of the deficiency.

If a vendor *fraudulently* represents the number of acres to be greater than the actual number conveyed, and thereby *induces* the vendee to give more for the tract than he otherwise would, the vendee is entitled to an abatement.

Abatement will also be made where there is *gross mistake*. Gross mistake is where the difference between the actual and the estimated quantity of land represented is so great as to clearly warrant the conclusion that the parties would not have contracted had they known the truth.

The least certain and least material parts of a description must give way to the more certain and material, and the mention of the number of acres after a certain description of the subject by metes and bounds, monuments or possession, is but matter of description, and not of the essence of the contract, and the purchaser takes the risk of quantity, where there is *no fraud* nor *gross mistake*.

If the description calls for so many acres, "more or less," and the quantity falls short or overruns a little, no compensation is to be given either party, where there is not proof of fraud.

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Mere enumeration of quantity of land at the end of a particular description of premises by courses, distances, boundaries and monuments, is matter of description only, and is subject to the controlling parts of the description; and if the purchaser has the distinct thing for which he contracted, the court will not interfere, if there be a deficiency in the contents not grossly large, unless there be proof of deception by the vendor. See *Clark v. Carpenter*, 4 C. E. Gr. 328; *Crouse v. Boyles et al.*, 3 Gr. Ch. 212; *Weart v. Rose*, 1 C. E. Gr. 290; *Andrews v. Rue*, 5 Vr. 402; 4 Kent Comm. 466; 1 Story's Eq. Jur. § 141; *Mann v. Pearson*, 2 Johns. 37; 3 Wash. on Real Prop. (3 ed.) *630.

The above are conclusions arrived at in adjudications on this somewhat vexed question, which should be kept in mind when examining the testimony in the cause now under consideration.

In reading the evidence, the first thing which attracts attention is the *entire absence of proof of fraud* on the part of Mr. Dayton. He represented, as to the quantity of land, only what had been represented to him, and that which he believed to be true.

Nor was there *gross mistake*. The deficiency in a tract of nearly one hundred acres is only four and forty-hundredths of an acre. The evidence does not show that Melick would not have given as much for the tract had he known the true quantity of land. The nature of the property furnishes a strong presumption that he would not have been influenced by a small deficiency in quantity. The premises consisted of a mill and valuable water-power, a large house containing twenty rooms, with furnace, hot and cold water, an extensive lawn in front, and other improvements which made it a desirable country-seat, with about fifty acres of arable land, and the residue low and wet, not fit for the plow. The chief value of the property was in the mill-seat, buildings, improvements and arable land, and a deficiency of a few acres of land which could not be cultivated detracted little, if any, from its value.

Melick knew the premises well, and had resided adjoining them for many years. He knew the proportion of tillable land

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as well as Dayton. He was on the premises when the contract was made, and could see what he was purchasing. The description in the deed from Dayton to Melick is by metes and bounds. On almost every course, adjoining tracts are called for. The location of all these tracts was known to Melick. Before the bargain was concluded he went over the premises and noticed the boundaries indicated by fences.

At the end of the description in the deed, the number of acres is given as "more or less." It is clear, from the evidence, that the quantity of land in this case was not of the essence of the contract, but mere description, and governed by the more definite parts of the deed.

It is true that Melick says he bought the property by the acre. This, Dayton denies, and testifies that he sold the premises, not by the acre, but as an entirety, or, as some of the witnesses express it, "in the lump," for the sum of \$17,000, and that, while he stated the number of acres as had been told him, no regard was paid to the representation of quantity, but the mill-seat and improvements and tract of land, in their entirety, as known to Melick as well as by himself, were sold for the gross price aforesaid.

Mr. Dayton's testimony on this point is supported, not only by other witnesses, but by circumstances, and his version of the transaction is taken as true. Although Melick knew, soon after the purchase, that the premises fell a little short of the quantity named in the deed, he made no complaint until about the time of the threatened foreclosure.

Melick is not entitled to any deduction from the mortgage on account of deficiency in the quantity of land.

The principal and interest of the bond and mortgage should be paid to Dayton after deducting only the credits endorsed on the bond.

That part of the decree from which Melick appeals is affirmed, with costs.

That part of the decree from which Dayton appeals, is reversed.

Burnett v. Vredenburg.

For reversal—BEASLEY, C. J., DEPUE, DIXON, PARKER,
REED, VAN SYCKEL, COLE, GREEN—8.

For affirmance—DODD, WHITAKER—2.

WILLIAM H. BURNETT, appellant,

v.

CAROLINE VREDENBURGH, respondent.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is published in *Vredenburg v. Burnett*, 4 *Stew. Eq.* 229.

The question involved in this case is the priority of mortgages. One is held by the respondent and one by appellant. Both claim priority. Both mortgages were made by W. S. Leonard and wife to A. G. Plume, and Mary J. Lockwood. Both are dated April 1st, 1871. Both cover the same premises. Both are stated on their face to have been given for purchase-money. The respondent's mortgage is for the sum of \$4,000; was acknowledged May 20th, 1871; was recorded May 23d, 1871; was assigned to Eliza Rooney May 22d, 1871. In the assignment, Plume guarantees the payment of the mortgage debt. July 12th, 1877, Mrs. Rooney assigned the mortgage to the complainant. The mortgage held by the appellant was acknowledged May 20th, 1871; was recorded May 22d, 1871, at half-past nine A. M. The history of these two mortgages, and the transaction out of which they arose, is this:

In the fall of 1870, Leonard, the mortgagor, agreed to purchase a lot of Plume and Lockwood, on Third avenue, in Newark, on which they were to erect for him a dwelling house. The lot was twenty-five by one hundred and fifty feet. He was to pay them a certain amount in cash, and

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give back a mortgage as for the purchase-money, for \$4,000. In February, 1871, he agreed to purchase an additional lot adjoining for \$1,500, giving a mortgage for the purchase-money to cover both lots. He paid the purchase-money to be paid in cash. When the deed was made from Plume and Lockwood to Leonard, it conveyed the two lots by one description. Two mortgages, with bonds accompanying, were sent by Plume to Leonard to be executed. Leonard says he executed them, supposing and believing that they had been drawn according to his agreement with Mr. Plume. In fact, both mortgages covered the entire premises. Plume says that at the date of the assignment to Mrs. Rooney, he stated to her agent, Mr. Wilkinson, that the \$4,000 mortgage was first in priority. Mr. Burnett states that Mr. Plume assured him at the date of the assignment to him of the \$1,500 mortgage, that it was a first lien on the lot last sold to Leonard, and second on the lot first sold, and that he had been so assured before he took it, by Mr. Leonard, the mortgagor. He further states that he purchased the mortgage for its full value in good faith, supposing and believing that it was a first lien on the second lot, and that he had no intimation or knowledge to the contrary, or that it was claimed to the contrary, until about the time of the commencement of this suit.

Mr. Joseph Coult, for appellant, cited—

Shannon v. Marselis, Sax. 413; Cornish v. Bryun, 2 Stock. 146, 154; Westervelt v. Scott, 3 Stock. 80, 83; Danbury v. Robinson, 1 McCart. 213, 218; Conover v. Van Mater, 3 C. E. Gr. 481; Kamena v. Huelbig, 8 C. E. Gr. 78; Atwater v. Underhill, 8 C. E. Gr. 600, 606; Drake v. Bray, MS. 1821; Redfearn v. Terrier, 1 Dow 50; Murray v. Lylburn, 2 Johns. Ch. 441; 1 Story's Eq. Jur. § 399, note 3.

Mr. Aram G. Sayre, for respondent, cited—

Gausen v. Tomlinson, 8 C. E. Gr. 406; Holmes v. Stout, 2 Stock. 426; Tatem v. Green, 6 C. E. Gr. 364; Hoy v. Bramhall, 4 C. E. Gr. 572; Nichols v. Peak, 1 Beas. 69.

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No written opinion was delivered on behalf of the majority of the court.

PARKER, J., dissenting.

This is an appeal from a decree of chancery in a foreclosure case. The question is as to priority of mortgages.

Both mortgages were executed on the same day, upon the same premises, to the same mortgagee, and both purported to be for purchase-money.

Both mortgages were assigned; one to the complainant and the other to the defendant.

The mortgaged premises consisted of two adjoining city lots, on one of which was a house.

The mortgage assigned to defendant was first recorded.

There is no doubt that while the mortgagee held both mortgages, they were concurrent liens.

The mortgage now held by complainant was first assigned by the mortgagee, and the assignee was then told that it was first in order of priority on the whole premises. But such statement was not inserted in the deed of assignment.

Subsequently, the defendant purchased the other mortgage. He knew it was recorded first, and, by the registry, appeared prior to the mortgage held by complainant upon both lots.

Before paying his money for it, and taking an assignment, he was told upon inquiry of the mortgagee, who had previously assigned the mortgage which complainant holds, that the mortgage he was about to assign to him was second to complainant's mortgage on the house lot, but was first on the vacant lot.

The defendant did not know that at the time of the assignment of the mortgage to complainant, or at any other time, the mortgagee had stated that it was a first mortgage on the whole property.

The defendant was a *bona fide* assignee of the mortgage transferred to him, and he took it free from all latent or secret equities.

The defendant found the mortgage of which he was about to take an assignment first of record, and apparently prior to the other mortgage on both lots, but upon inquiry of the mortgagee,

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who originally held both mortgages, and knew what was said at the time of the assignment of the mortgage the complainant holds, he was told that complainant's mortgage was first on the house lot, but was not first on the vacant lot. Upon receiving this information, the defendant paid his money and took an assignment of the mortgage.

The defendant was not bound to inquire further. The mortgagor could not give him any information, for he was not supposed to know what the mortgagee had said or done, when he assigned the mortgages, to affect their order of priority.

The defendant could have insisted upon the record, had he not been informed that it had been qualified to some extent. He is bound to the extent of the information he received, but no further. He was not obliged to seek further to contradict or qualify the record.

The complainant's mortgage should be paid first out of the proceeds of the sale of the house lot, but not first out of the proceeds of the vacant lot.

I think the decree should be reversed.

For affirmance—BEASLEY, C. J., DIXON, SCUDDER, VANSYCKEL, CLEMENT, COLE, DODD, GREEN—8.

For reversal—DEPUE, PARKER, REED—3.

BRIDGET HANNON, appellant.

v.

W. B. WILLIAMS, receiver of the Mechanics and Laborers Savings Bank of Jersey City, respondent.

1. A depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed, is not entitled to set off the amount of his deposit against his indebtedness. The ordinary rules of set-off between debtor and creditor do not apply to the case.

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2. The giving of the depositor credit for the amount of the loan on the books of the bank, the same being entered in her pass-book and remaining subject to her check for a long time before the bank closed its doors, was an actual payment of the money to her. And she is not entitled to a deduction from her indebtedness of so much of the borrowed money as remained on deposit when the bank suspended payment.

On appeal from a decree advised by Vice-Chancellor Van Fleet, dismissing the appellant's bill. His opinion is not on file.

Mr. Peter Bentley, for appellant.

I. The right of set-off exists in appellant's favor against the defendant.

White v. Williams, 2 Gr. Ch. 376; *Rosevelt v. Niagara Bank*, Hopk. Ch. 579; *Attorney-General v. Mechanics and Laborers Savings Bank*, 5 Stew. Eq. 163; *New Amsterdam Savings Bank v. Tartter*, 54 How. Pr. 385; *Wartrus v. Bowery Savings Bank*, 21 N. Y. 543; *Perry on Trusts* § 17.

II. Equity will take notice of the circumstances surrounding the giving and obtaining of a valuable security, and if those circumstances should, in equity, preclude the enforcement of that security, it will so be done; that the holder is a trustee does not matter, in the application of the doctrine. *Story's Eq. Jur.* §§ 204-221.

Mr. W. B. Williams, pro se, cited—

Attorney-General v. Mechanics and Laborers Savings Bank, 5 Stew. Eq. 163; *P. L. of 1869* p. 177; *Albany Law Jour.*, Oct. 23d, 1880; *Am. Law Rev.* March, 1881.

The opinion of the court was delivered by .

GREEN, J. The appellant in this case was a depositor in the Mechanics and Laborers Savings Bank of Jersey City. While such depositor, and more than a year before the bank was de-

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clared insolvent, she borrowed from the corporation the sum of \$2,000, and secured the same in the usual manner by bond and mortgage on her real estate. The money borrowed was, at her request, placed to her credit in the bank, subject to her check, and the amount entered in her pass-book as a deposit. After this transaction, the appellant continued to make cash deposits and draw checks until the bank discontinued business, when the balance standing to her credit amounted to \$2,416. Included in this balance was a considerable portion of the money borrowed of the bank, which she had allowed to remain on deposit. The corporation having been adjudged insolvent by the chancellor, a receiver appointed, and demand made by him for the payment of the mortgage debt, the appellant filed her bill praying that her deposit might be offset against the amount due on her bond and mortgage, and the mortgage delivered up to be canceled.

The main question presented for consideration in this case is, whether a depositor in an insolvent savings bank, who is also a debtor of the institution for money borrowed, is entitled to offset the amount of his deposit against the money due on his obligation in the hands of the receiver?

The insolvency of the party against whom a set-off is claimed has long been considered sufficient ground for the allowance by a court of equity of set-off not within the statute. And under the provisions of the statute to prevent frauds by incorporated companies, the right of a debtor of an insolvent corporation to offset his claim against the receiver is recognized and established both at law and in equity.

But to entitle a party to such equitable relief in a case not provided for by the statute, his natural equity to have one claim compensate or discharge another must be superior to any equitable claim which can be urged in favor of those parties for whose benefit his claim to an equitable offset is resisted. *Waterman on Set-Off* § 439; *Holbrook v. Receivers*, 6 Paige 231.

Applying this principle, our investigation is reduced to the single inquiry, Is the equity of the appellant to off-set her deposit against the amount due on her bond and mortgage, superior to the equity of the other depositors to have the mortgage debt

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collected and added to the general fund for the payment of all the depositors?

In the solution of this question, regard must be had to the peculiar character of the corporation itself, and to the mutual relations of the depositors to each other and to the corporation. Savings banks differ widely in their objects, organization and character from ordinary banks and other joint stock companies. They have no capital stock. They are incorporated and organized not for the advantage of the corporators, but solely for the benefit of the depositors. Their object, as stated in some of the early charters of this state, is to receive and safely invest the savings of mechanics, laborers, servants, minors and others, thus affording to such persons the advantages of security and interest for their money, and in this way ameliorating the condition of the poor and laboring classes by engendering habits of industry and frugality.

Properly organized and conducted, a savings bank is a *quasi* charitable and purely benevolent institution. Its only object, the safe keeping and provident investment of the funds of the depositors. The members of the corporation have no property interests in its funds, of which they are by law constituted the managers and guardians. The depositors, who alone are beneficially interested in the prosperity of the bank, have no voice in its management, nor even in the selection of the persons to whom its management is entrusted.

The assets of the bank are its invested funds, the common contributions of all the depositors, in which they all have a common interest. All the profits of the business are divided among the depositors or accumulated in a surplus fund for their joint benefit and greater security. As each depositor is entitled to his proportionate share of the profits, so, in equity, each should bear his proportionate share of the losses. So long as the bank is solvent no injury can arise from permitting a depositor to off-set his deposit against his debt due to the bank, as no preference would be given in such case to one depositor over another. But in case of insolvency, to allow the set-off to be made would give an unjust preference to debtor depositors over all the others.

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In a savings bank, the depositors bear, in great degree, the same relation to each other and to the property of the bank as do the stockholders in other monetary institutions. To the corporation itself they occupy the double relation of stockholders and creditors. In prosperity, they are the stockholders among whom the profits are divided. In case of insolvency, they are the creditors, and usually the only creditors, among whom the remaining assets are to be distributed. If the depositors were themselves made by law the corporators, empowered to elect managers from their own number, thus forming a mutual savings bank, the similarity would be more complete, and the natural equity of the depositors in their mutual relations to each other and the corporation more clearly apparent.

The fact that the law for the greater security of the depositors and the more provident investment of their funds has wisely taken the management out of their control and placed it in the hands of disinterested corporators, cannot in equity change the relations of the depositors to each other, or affect their mutual interest in the common fund.

In some aspects the relations of the depositors to each other and the corporation are identical with those of the members of a mutual insurance company. In the one case, a deposit is made to obtain for the depositor a direct profit in the way of interest on the investment—in the other, to protect the members against a possible loss. In both cases the depositors or members have the same common interest in the accumulated assets of the corporation, the common fund to which they alike look for profit or for indemnity. In both they participate in the profits and bear their proportionate share of the losses—and from either, the depositor may at will, so long as the corporation remains solvent, withdraw his deposit, and thus sever his connection with the institution.

In *Hillier v. Allegheny Mutual Insurance Co.*, 3 Pa. St. 470, Chief-Justice Gibson adjudged that the loss of a member of a mutual insurance company could not be off-set in an action on his premium note, when the funds of the company were not adequate to pay all losses, holding that to allow the set-off would

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work injustice by enabling a member who stood in the double relation of debtor and creditor to get more than his share of the common fund, and that the proper plan of settling the affairs of an insolvent company of mutual insurers is to liquidate its means and responsibilities separately.

The New York court of appeals, in *Lawrence, Recr., v. Nelson*, 21 N. Y. 158, held the same doctrine, and Chief-Justice Comstock, in a well-considered opinion, placed his decision upon the ground that the defendant, though both a creditor and a debtor of the institution, occupied still another relation, to wit, that of a member of the company and a contributor to the common fund paid in for the security of all the members—that like every other member of a moneyed or trading corporation, he took the chances both of gain and loss—and that in such case the rules of set-off between debtor and creditor have no application. The reasoning of the chief-justice in that case applies equally to the one now under consideration.

The case of *Osborne v. Byrne*, 43 Conn. 155, is directly in point, and expressly holds that a depositor in a savings bank, who is also a debtor to the bank as a borrower of its funds, cannot, upon the insolvency of the bank, off-set the amount of his deposit against his indebtedness. The result was reached upon a similar course of reasoning, viz.: That the debt owed by the depositor to the corporation belongs, in fact, to all the depositors, but neither the institution nor the other depositors owe him anything more on his deposit than his just proportion of the assets owned by the bank.

In *Stockton v. Mechanics and Laborers Savings Bank*, 5 Stew. Eq. 163, the same question now before the court was presented to the chancellor for his decision, upon the petition of the receiver for instructions, and in that case the chancellor decided that a depositor who is also a debtor to the bank, is not entitled to off-set the amount of his deposit against his indebtedness. In the result reached by the chancellor I entirely concur, as the true rule in the case, sanctioned both by principle and authority.

The only case I have found holding a contrary doctrine is *Receiver of the New Amsterdam Savings Bank v. Tartter*, 54 How.

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Pr. 385; but, upon examination, that decision appears to be rested mainly on the general rules of set-off between debtor and creditor, without due regard to the peculiar character of the institution in process of liquidation.

It is, however, insisted, on the part of the appellant, that even if she cannot set off her deposit against her indebtedness, still that she is entitled to have deducted from the mortgage debt so much of the consideration of the mortgage or the money borrowed thereon as never actually came to her hands but remained on deposit to her credit in the bank.

This contention is not tenable. Under the circumstances, the giving of the appellant credit for the amount of the loan on the books of the bank was equivalent to the actual payment of the money to her. From the date of the entry of the deposit it was subject to her check or order, and could have been drawn by her at any time. It so remained subject to her order for more than a year before the bank closed its doors, and during that time the appellant received regular dividends on the deposit. In ordinary banking operations, loans and discounts are usually placed to the credit of the customer, and are drawn out by check as needed. The same practice prevails to some extent in savings banks. In this case the deposit was made at the appellant's request, and it does not lie in her mouth to except to it.

It is further urged, on the part of the appellant, that the bank being in failing circumstances at the time of making the loan, the whole transaction was fraudulent and void as against her. It is not pretended that any inducements were held out by the managers or officers to induce the appellant to execute the bond and mortgage to the bank. The loan was made at the request of the appellant and for her accommodation. The making of a well-secured loan, if the funds were on hand for the purpose (which is not denied), even if the bank was in failing circumstances at the time, was a provident act, and for the benefit of all the depositors. The appellant herself could not have been prejudiced by it if she had withdrawn the money in a reasonable time. The charge either of actual or constructive fraud is not sustained by the allegations of the bill.

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The decree of the court of chancery should be affirmed, with costs.

For affirmance—BEASLEY, C. J., DEPUE, PARKER, SCUDDER, VAN SYCKEL, CLEMENT, COLE, DODD, GREEN—9.

For reversal—DIXON, REED—2.

THE MAYOR AND COMMON COUNCIL OF THE CITY OF NEWARK, appellants,

v

FRANCES SCHUH, respondent.

1. The case of *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568, approved.
2. The court of errors will not reconsider or review one of its own decisions at the instance of a litigant.
3. Under existing laws, a land-owner whose lands have been assessed for benefits in the making of a public improvement, and sold, by force of an unconstitutional law, can procure a re-assessment, and, consequently, he cannot now file a bill to remove the cloud of such illegal assessment and sale from his title.

On appeal from a decree of the chancellor, whose opinion is reported in *Schuh v. Newark*, 5 Stew. Eq. 466.

The bill in this cause was exhibited for the purpose of removing a cloud from the title of the complainant's land, such cloud consisting in a purchase made by the city of Newark of the premises in question, the same having been sold for an unpaid assessment for a city improvement.

Mr. Henry Young, for the appellants.

In 1871, the common council of Newark passed an ordinance

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which was approved by the mayor, authorizing the paving of a portion of South Orange avenue. In accordance with the terms of this ordinance, the avenue was paved. Subsequently, on the 5th day of April, in the year 1872, an assessment of the whole amount of the costs and expenses of the said improvement was made by the city surveyor upon the lands and real estate on the line thereof. This assessment was made under the provisions of section 109 of the charter of Newark. *P. L. of 1857 p. 116.* This section provides :

"That the whole amount of the costs and expenses of regulating, grading and paving any street, or section of a street, * * * * shall be assessed upon the owners of lands and real estate upon the line of said street, or section of a street; and whenever such improvement shall have been made under the provisions of this act, the common council shall ascertain the whole amount of the costs and expenses of such improvement in any street or section of a street, and shall cause to be made a just and equitable assessment thereof, upon the owners of lands and real estate on the line of said street, or section of a street, by the city surveyor."

The amount assessed upon the property in question (then belonging to one Jacob Baker), was \$178.19. It is not alleged in the bill that this amount was excessive; and hence, it may fairly be assumed that, however defective the legal system devised by the legislature, no greater sum was assessed upon the property of the respondent than its increased value by the reason of the improvement.

This assessment was unpaid, and on the 12th of June, 1873, the comptroller (the duly authorized officer) sold the lands in question for the amount of the assessment, to the city, for a term of fifty years; and a *certificate* of such sale was duly made and recorded, as required by law. This certificate is still held by the city, and is a lien upon the property described therein. (Section 88 of charter).

No declaration of sale has been issued thereon, and it should be remarked and carefully noted that only under a *declaration* of sale does a purchaser become entitled to *possession*. A certificate of sale confers no such right.

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In May, 1879, more than seven years after the assessment in question had been made, the respondent purchased the land so assessed and sold, for a valuable consideration. She made this purchase with full knowledge of the city's lien, and, no doubt, was allowed a deduction by reason thereof. At any time since her purchase she might have redeemed her land from this claim, for by the charter of the city (section 92) lands sold for taxes and assessments may be redeemed at any time before a declaration of sale shall have been executed and recorded. *Bogert v. Elizabeth*, 12 C. E. Gr. 568; *Lembeck v. Jersey City*, 4 Stew. Eq. 255; *Morris Canal Company v. Jersey City*, 1 Beas. 256; *Holmes v. Jersey City*, 1 Beas. 310; *Liebstein v. Newark*, 9 C. E. Gr. 200; *Dusenberry v. Newark*, 10 C. E. Gr. 287; *Bogert v. Elizabeth*, 10 C. E. Gr. 427; *Agens v. Newark*, 8 Vr. 415; *Evans v. Jersey City*, 6 Vr. 381; *Buxter v. Jersey City*, 7 Vr. 188; *Graham v. Paterson*, 8 Vr. 384.

Mr. Frank B. Allen, for respondent.

I. The provisions of the statute under which the assessment was made were unconstitutional. *Agens v. City of Newark*, 8 Vr. 415.

II. A sale of the property under an assessment made under an unconstitutional law having taken place, and the premises sold to the city of Newark for the term of fifty years, and said city taken a certificate of sale therefor, such certificate of sale, with an assertion of title on the part of the city, constitutes a cloud removable by a court of equity. *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568; *P. L. of 1870 p. 26*; *Story's Eq. Jur.* 700; *Rev. 1045 § 15*; *Graham v. Paterson*, 8 Vr. 384; *Baxter v. Jersey City*, 7 Vr. 191; *Lembeck v. Jersey City*, 4 Stew. Eq. 255.

The opinion of the court was delivered by

BEASLEY, C. J.

The facts of this case are admitted to be identical with those

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which were presented to this court for its consideration in the case of *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568, and the chancellor, when the matter was before him, granted the relief prayed for on the footing of that authority. It is not apparent how the propriety of that decision can, with any show of reason, be called in question. The question involved was plainly *res adjudicata*, and it is not the practice of this court to reconsider its conclusions at the instance of litigants. The decree appealed from should be affirmed.

It may not be amiss, however, to remark that no force is perceived in the argument so strongly pressed before this court, founded on the supposed hardship to municipalities ensuing from the rule of law established in the case of *Bogert v. City of Elizabeth*. The purchase-titles, which, according to the case referred to, may be dissolved by a direct proceeding for that purpose, do not appear to be of any value to any one. As they cannot be enforced by the city, why are they worth retaining? It is said that these lands actually benefited by the public improvements, should not be permitted to be exonerated from all part of the expense of making such improvement. This is granted—but the retention of a worthless purchase-title does not prevent that result. The truth is, the lands stand entirely disburthened from their quota of such expense so long as the *status* continues of an assessment made under an unconstitutional law, and a purchase by the city by virtue of proceedings in pursuance of such assessment, and I have never been able to see why the city should desire to preserve such a *status*. If it be true, as we are told, that considerable amounts of money due to the cities of the state are in this uncollectible condition, I think it is manifest that the cities themselves are to blame for the misfortune, for it cannot be doubted on an application to the legislature adequate relief could be obtained. Suppose a law should be enacted authorizing these municipalities to set aside, so far as unpaid or unsettled assessments for improvements are concerned, all assessments heretofore made by force of unconstitutional laws, and providing for a re-assessment with respect to such lands, on a constitutional basis, there seems to be no ground to suppose

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that such an act would not apply to the lands of this complainant, as well as to the lands of all other persons similarly situated. By force of such a law, properly framed, such part of these arrearages as is justly due, could be readily collected, and the only apparent reason why the same has not been long since realized, would seem to be the supineness of those in authority in municipal affairs.

And with respect to the suggestion that these equitable suits, with respect to this class of assessments, are likely to be numerous and therefore oppressive, it is enough to say that in view of recent legislation, it is not perceived how, in the future, a bill of this nature could be upheld. The legislation to which reference is here made, is that series of acts which provides, in case lands have been illegally assessed, for proceedings of re-assessment at the instance of the owner. These laws give, therefore, to the land-owner an equitable remedy, whereby these clouds upon his title can be removed, and, consequently, upon well-settled principles, he will be compelled to resort to that course of redress, for he cannot ask a court of equity for relief, when, by paying what is justly due, he will stand in no need of such relief.

The decree should be affirmed.

Decree unanimously affirmed.

GEORGE S. COE et al., appellants,

v.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY et al., respondents.

1. A railroad company having filed a survey of a route over which another company also had filed a survey, having held such other company out as the builder of the track over such route, and having taken the benefit of a contract incident to the laying of such route, made in the name of such other

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company, cannot repudiate such contract, on the ground that itself is the builder of such road.

2. When a mortgage is given by a railroad company on its franchises and on its roads to be thereafter built, and a branch road, not in contemplation at the date of such encumbrance, is afterwards laid and built, such branch road will pass under such mortgage subject to the burthens put upon it by the company in the course and as incidents of its acquisition.

On appeal from a decree of the chancellor, whose opinion is reported in *Coe v. N. J. Midland R. R. Co.*, 4 *Stew. Eq.* 105.

Mr. Cortlandt Parker, for appellants, cited—

M. & E. R. R. Co. v. Central R. R. Co., 2 *Vr.* 209; *Moorehead v. Little Miami*, 17 *Ohio* 340; *Blakeman v. Canal Co.*, 1 *Md.* 154.

Corporations can be bound by implied contracts to be deduced by inference from corporate acts, without either a vote, or deed, or writing. *Bank of Columbia v. Patterson*, 7 *Cranch* 299; *Bank of the United States v. Dumbridge*, 12 *Wheat.* 74; *Perkins v. Washington Ins. Co.*, 4 *Cow.* 645; *American Ins. Co. v. Oakley*, 9 *Paige* 496; *Fanning v. Gregoire*, 16 *How.* 524; *Abbott v. Hermon*, 7 *Greenl.* 118; *Frankfort Bridge Co. v. City of Frankfort*, 18 *B. Mon.* 41; *Peterson v. Mayor &c.*, 17 *N. Y.* 449-453; *Fister v. La Rue*, 15 *Barb.* 323; *Congregation Beth Elohim v. Central Presbyterian Church*, 10 *Abb. (N. S.)* 484; *Ang. & Ames on Corp.* 216, 218 *ch. VIII.* § 8, and cases cited; *U. S. v. N. O. R. R. Co.*, 12 *Wall.* 364; *Williamson v. N. J. Southern R. R. Co.*, 2 *Stew. Eq.* 317, 319, 320, 321; *Fenner v. Lewis*, 19 *Johns.* 38; *Meade v. McDowell*, 5 *Binn.* 195; *Bigelow on Estoppel* 578-588; *Phillipsburgh Bank v. Fulmer*, 2 *Vr.* 52; *Den v. Baldwin*, 1 *Zab.* 395, 403; *Philhower v. Todd*, 3 *Stock.* 312; *Morris Canal v. Lewis*, 1 *Beas.* 323; *Pickert v. Ridgefield R. Co.*, 10 *C. E. Gr.* 316; *Carpender v. Carpenter*, *Id.* 184.

Mr. John W. Taylor, for respondents.

I. The appellants were not entitled to a specific performance

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of the agreement of October 16th, 1872, against the complainants.

II. The decree rightfully requires the appellants to pay the value of the land taken for the crossings, and the damages sustained in consequence thereof. *Coe v. N. J. Midland R. R. Co.*, 1 *Stew. Eq.* 27; *Williamson v. N. J. Southern R. R. Co.*, 2 *Stew. Eq.* 211; *Cortes v. City of Davenport*, 9 *Iowa* 227; *Beyer v. Tanner*, 29 *Ill.* 135; *Hatfield v. Cent. R. R. Co.*, 4 *Vr.* 251; *Jersey City v. Montclair R. R. Co.*, 6 *Vr.* 328; *M. & E. R. R. Co. v. Blair*, 1 *Stock.* 635.

III. If the respondents are entitled to damages &c., they are entitled to a reference to ascertain them.

IV. The mortgage of the respondents included the railway over which the right of crossing is claimed by the appellants. *Jones on R. R. Securities* § 130; 1 *Jones on Mortgages* (2d ed.) §§ 155, 157; 2 *Redfield on Railways* (5th ed.) 503; *Green's Brice's Ultra Vires* (2d ed.) 235, and note A; *Seymour v. Canandaigua &c. R. R. Co.*, 25 *Barb.* 284; *Meyer v. Johnston*, 53 *Ala.* 227, 330; *Willink v. Morris Canal Co.*, 3 *Gr. Ch.* 377; *Williamson v. N. J. Southern R. R. Co.*, 10 *C. E. Gr.* 13; *S. C.*, 2 *Stew. Eq.* 311; *Holroyd v. Marshall*, 10 *H. L. Cas.* 191; *Pennock v. Coe*, 23 *How.* 117; *Dunham v. R. R. Co.*, 1 *Wall.* 254; *Galveston R. R. Co. v. Cowdrey*, 11 *Wall.* 459; *Pierce v. Emery*, 32 *N. H.* 484; *Mitchell v. Winslow*, 2 *Story* 630; *Phillips v. Winslow*, 18 *B. Mon.* 431; *Elwell v. Grand St. and Newtown R. R. Co.*, 67 *Barb.* 83; *Pierce v. Emery*, 32 *N. H.* 484; *Shamokin Valley R. R. Co. v. Livermore*, 47 *Pa. St.* 465; *Stevens v. Watson*, 4 *Abb. Ct. of App. Dec.* 302; *Evansville and Crawfordville R. R. Co. v. Dick*, 9 *Ind.* 433.

V. With respect to the remaining ground of appeal, viz., "that the said decree declares and decrees that the Hudson Connecting Railway Company had no title to or right in the right of way covered by said crossing," it is sufficient to remark :

1. That the appellants are not the Hudson Connecting Railway Company, and cannot allege themselves to be "aggrieved"

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by this part of the decree, nor can they appeal therefrom. They can appeal only from such parts of the decree as affect *them*, and cannot call in question other parts of the decree in which they have no interest. 2 *Daniell's Ch. Pr.* (4th ed.) p. 1489, and note 2; *Idley v. Bowen*, 11 *Wend.* 227; *Hone v. Van Schaick*, 7 *Paige* 222.

Mr. D. H. Chamberlain, of Maine, for respondents.

From this decree the present appellants appeal, for the following reasons :

1. Because the decree holds that the appellants are not, as against the trustees of the first mortgage, entitled to the specific performance of the agreement between the appellants and the Hudson Connecting Railway Company, set up in appellants' cross-bill.

2. Because the decree holds that the appellants should be required to pay to the said trustees, as mortgagees, the value of the land taken by the appellants and for the crossings made by them of the tracks and right of way of the New Jersey Midland Railway Company, and all damages sustained by the latter company and its mortgagees by reason of said crossings.

3. Because the decree refers it to a master to ascertain and report the amount of the value and damages, and reserves the subject for a separate supplemental decree.

4. Because the decree holds that the Hudson Connecting Railway Company had no title or right in the right of way covered by said crossings, and the mortgage to the trustees included the railway of the Hudson Connecting Railway Company over said crossings, and that the appellants' right in said crossings is to be considered as subject to the said mortgage to the trustees.

5. Because the decree orders a writ of *fieri facias* for the sale of the appellants' interest in said crossings; and orders the appellants to surrender possession to the purchaser at such sale.

I. As to the appellants' right to specific performance. *Fry on Spec. Perf.* §§ 79, 103; *Vandyne v. Vreeland*, 3 *Stock.*

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379; *Fry on Spec. Perf.* § 251; *Clarke v. Rochester, L. and N. R. R. Co.*, 18 Barb. 350; *Story's Eq. Jur.* § 750; *Fry on Spec. Perf.* § 252; *Vandyne v. Vreeland*, 3 Stock. 370, 381; *Johnson v. Hubbell*, 2 Stock. 332, 342; *McDavitt v. Pierrepont*, 8 C. E. Gr. 42; *Dickerson v. Colgrove*, 100 U. S. 578, 580; *Erie R. R. Co. v. Del., Lack. and West. R. R. Co.*, 6 C. E. Gr. 283.

II. As to that part of the chancellor's decree which requires the appellants to pay to the trustees the value of the land taken, and for the crossings made, and for all damages sustained by the Midland company and its mortgagees by reason of such crossings.

III. As to the title of the Hudson Connecting Railway Company to the right of way covered by the crossings in question, and as to the subordination of the rights of the appellants in the said crossings to the trustees' mortgage.

IV. If the several positions already maintained in this argument shall be regarded as correct, it will remain to inquire what is the attitude of the appellants toward the trustees, as mortgagees, upon the foreclosure of their mortgage. *Sedgwick on Meas. of Dam.* (7th ed.) [134] note (a); *Berry v. Vreeland*, 1 Zab. 183; *Van Schoick v. Del. & Rar. Can. Co.*, *Spen.* 249; *Readington v. Dilley*, 4 Zab. 210; *Som. & E. R. R. Co. v. Doughty*, 2 Zab. 495; *Trenton Water Power Co. v. Chambers*, 2 *Beas.* 199.

V. In respect to the remaining grounds of appeal from the chancellor's decree. *Chegary v. Scofield*, 1 Hal. Ch. 525; *Ryerson v. Boorman*, 3 Hal. Ch. 640; *Schenck v. Conover*, 3 *Beas.* 32.

The opinion of the court was delivered by

BEASLEY, C. J.

In consequence of the voluntary withdrawal of several of the parties to this appeal, but two questions are left for solution by this court, and those questions are, Whether a certain written

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agreement, made between the Hudson Connecting Company and the Morris and Essex Railroad Company and the Delaware, Lackawanna and Western Railroad Company, has a legal existence, and, if so, what is its legitimate interpretation, bearing date 16th of October, 1872. The substance of this agreement is, that the Morris and Essex Railroad Company should permit the Hudson Connecting Company to construct its railway over that of the Morris and Essex, and, as an equivalent, that the latter company should have the right to cross the track of the former.

This contract is drawn into controversy in this wise: George S. Coe, as trustee of certain bondholders of the New Jersey Midland Railway Company, is the original complainant in these proceedings, having filed his bill to foreclose a mortgage given to him by that company as a security of the bonds just mentioned. To that suit the Delaware, Lackawanna and Western Railroad Company, as the lessee of the Morris and Essex, were joined as a party. This latter company, during the pendency of these proceedings, attempted to construct its line of road by force of the agreement just referred to, over the line of the road which it insists is the property of the Hudson Connecting Company, and such effort having been resisted, it filed its bill for a specific performance of the stipulation in question. To the claim thus set up, the complainant Coe, as trustee, denies the ownership of the Hudson Connecting Company to the line of railroad embraced in the agreement, and avers that this portion of the railroad track was laid out, constructed and paid for by the New Jersey Midland, and consequently that it passed under the trust mortgage. The circumstances relating to the controversy with respect to the title to this portion of railroad track are multiform and numerous, and they will be found detailed with fullness and accuracy in the opinion read in that case by the chancellor. From the view which I shall express touching the questions involved, it will not be necessary for me to recapitulate such facts with minuteness. The following outline will suffice to render the grounds of the conclusions arrived at by me, perspicuous:

The trust mortgage held by the complainant is dated 1st of August, 1870, and at that time, and up to the spring of 1871,

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the New Jersey Midland Railway Company designed to reach the Hudson river by a direct route, but on account of the expense, found such purpose impracticable, and therefore formed the plan of attaining the desired terminus by means of a connection with the Pennsylvania Railroad Company. In furtherance of this design, on the 12th of July, 1871, it filed a location of what it called its branch line, in its survey, from a point near Bellman's creek, to the Pennsylvania railroad, at West End. This route was identical with a survey laid by the Hudson Connecting Company, part of which had been laid before and part after that of the Midland. But this interference between these surveys was practically of no moment, as both these companies were under the same management. Under these circumstances, the Midland began to acquire the land necessary for this route, but in a proceeding to condemn lands, having been defeated on the ground of a want of power to lay the route in question, the agents in charge of the affair determined to lay such route in the name of the Hudson Connecting Company. Accordingly this was done, the New Jersey Midland taking the title to such pieces of land as were obtained by agreement with the owners, in its own name, the residue of the land being condemned by proceedings in the name and under the charter of the Hudson Connecting Company. In order to help pay the cost of the construction of this line of road, bonds have been issued by the connecting company to the amount of \$400,000, which were secured by a mortgage on its road and franchises. Part of these bonds were given to the Midland, and part to the Montclair railroad, a tributary of the former, and which, in this matter, was acting in concert with the former company. The line thus built was paid for in part by the Midland. The road having been built in this way, and the facts having been laid before the board of directors of the Midland, that body passed a resolution directing the title to the lands embraced in the route to be conveyed to the Hudson Connecting Company. That step was accordingly taken, the conveyance bearing date the 16th of October, 1873, and shortly afterwards the Midland took a lease of the road. These facts do not seem to me to be disputable. But the contention of

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the complainant is, that the proceedings of the agents of the Midland in acquiring this route by force of the charter of the Hudson Connecting Company, and for the uses of such company, was beyond the province of their agency, and that such a course of proceeding was, at the time, neither known to nor sanctioned by the body of directors of the Midland, and that when such board did subsequently sanction these steps, such ratification was void, as respects the complainant being a prior mortgagee. With respect to the condemnation of lands made by force of the charter of the Hudson Connecting Company, the position is, that in that matter the charter of that company was used merely as a means to an end—that is, to the acquisition of such lands by the Midland. Such a view appears to involve the proposition that if an agent, in good faith and in the belief that it is best for the interests of his principal, departs from his instructions and does an act not authorized, and the principal becoming aware of such act, in good faith ratifies it, such ratified act is not binding; and also the further proposition that a corporate body, possessed of right of eminent domain, can lawfully transfer such right, in its own discretion, *pro tanto*, to another corporate body. These propositions seem to underlie the position of the complainant with regard to the general aspects of this case. But as I think the matter now before the court can be settled without discussing or considering this position, I shall not express any opinion respecting it; nor shall I undertake to decide the further question whether this branch road is embraced in the description of the provisions contained in the complainant's mortgage—a question so ably discussed in the brief of the counsel of the appellants, for a solution of these questions is not necessary to the theory of decision which appears to me at present to be applicable.

That theory is that this respondent, the trustee, is not in a position to call this contract in question. If we assume the attitude of the respondent with respect to the ownership of this line of road here in dispute, and hold that such ownership resides in the Midland Railway Company, it is impossible to deny that in the acquisition of such roadway the Hudson Connecting Company was used as an agent by the managers of the first-

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named corporation. The title to lands has been extorted from unwilling land-owners in the name of the Hudson Connecting Company, for the benefit of the Midland. In his answer, the trustee is obliged to admit that a right to cross the Erie railway was acquired for the benefit of the Midland by the Hudson Connecting Railway Company. In addition to these acts, in April, 1872, the route of the road-bed in dispute leading across the road of the Morris and Essex, the agents of the Midland took proceedings to obtain a right to such crossing by condemnation in the name of the connecting company, such measure being, as it is now claimed, for the use of the Midland, and thereupon an agreement in writing was entered into between the Morris and Essex Railroad Company and the Hudson Connecting Company, whereby a crossing was acquired, which, up to the present time, has been in the full possession and use of the Midland. The contract thus made, as it is claimed, for the benefit of the Midland, was never dissolved by that company, even at the time of the filing of this bill. It was under these circumstances that in the fall of the same year the contract now in dispute was entered into. It will be remembered that this latter contract was likewise in the name of the connecting company, and by it a right was given to that company to lay its crossing for the use of the Montclair road over the Morris and Essex. The evidence shows that in laying this disputed piece of road the Midland and the Montclair railroads were acting in concert, each having received a portion of the bonds issued by the Hudson Connecting Company. In the light of the evidence it is impossible to deny that the New Jersey Midland Railroad Company was a party or privy to both these agreements, and both of them, in the most impressive manner, held out to the Morris and Essex that the line of road in question was being built by the Hudson Connecting Company. Under such conditions it does not seem to me of the least importance, so far as the present controversy is concerned, which corporation, in point of fact, was the real builder of this part of road, if it was the Hudson Connecting Company. Thus, plainly, the contract now under consideration is clearly valid, and so it seems to me it is plainly valid as against

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the respondent, even on the opposite assumption as to ownership, inasmuch as in all these transactions the Hudson Connecting Company was held out by the Midland as the builder and owner of the road. The chancellor, in his opinion, says that

"The connecting company merely lent its charter powers of condemnation to the latter [the Midland] to be used if and when necessary to effectuate the purpose of the latter, in the execution of which it then was, and for a considerable length of time had been engaged—the construction of its railroad from Bellman's creek to West End. That was the end and aim of the project of using the connecting company's charter, and the sum and substance of the whole matter."

It will be observed that no one act in the progress of the transaction thus described could be done without presenting, in the most imposing form, this connecting company as the builder of this line of road; and after carrying into effect such a project, and taking into its possession the track thus acquired, it is quite too late for the Midland railroad to attempt to repudiate a contract honestly entered into with the connecting railroad, in the orderly prosecution of such project.

And in such a respect as this it is an error to assume this respondent, as the mortgagee of the Midland, stands in a better position than his mortgagor. The fallacy of such a position arises from overlooking the circumstance that this mortgage, so far as we are now concerned, relates to a railroad track to be acquired and constructed after its execution. This particular road was not in contemplation, even, when this mortgage was given, and it is obvious that it must pass to the mortgagee with the burthens incident to its acquisition. All the property and rights acquired by the mortgagor enure to the benefit of the mortgagee; but nothing can be claimed by the latter beyond this.

The right to cross the Morris and Essex was a beneficial interest added to the value of the mortgaged premises; the equivalent for such right was the privilege of crossing such newly-built track by the former company. Such privileges and encumbrances were the usual and all but necessary arrangements incident to the laying of a railroad route, and they inseparably annex them-

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selves, partly as an advantage and partly as a disadvantage, to the property in the railroad, and in that way inevitably qualify the interest that comes to a prior mortgagee in such premises. The contract in question cannot be repudiated by this trustee—the property came to him *cum onere*.

Having thus concluded that this agreement is legally efficacious to hold all parties in interest to its terms, the next inquiry is as to its meaning and legal effect.

As I have said, this contract first gives to the Hudson Connecting Company the right to cross the track of the Morris and Essex at a certain point; it then stipulates in these words:

“*Third.* That if at any time hereafter the said parties of the first part [The Morris and Essex and the Delaware and Lackawanna] or either of them, shall desire to change the line and grade of the main line of the Morris and Essex railroad, or of the Boonton branch railroad, or both of them, as to make it necessary to cross the said railway of the said party of the second part, which, under this agreement, is to be constructed over the Morris and Essex railroad, or the railway which, under the said agreement of April 3d, 1872, had been constructed by the said party of the second part over the said Morris and Essex railroad, or over both of said railways, they, the said parties of the first part, or either of them, shall have the right, without charge, to cross either or both of said railways of the said party of the second part, over, under or at grade, and the said parties of the first part, or either of them, may occupy and use without charge so much of the lands of the said party of the second part as may be necessary for that purpose.”

By force of these stipulations, the Delaware, Lackawanna and Western Railroad Company claims the right to cross the track in question at a point where it runs through a piece of land about eighteen hundred feet long, used for terminal purposes and as a drill-yard. The question is, whether such a right has been conferred upon this company by virtue of this contract, the substance of which has been above quoted.

In my opinion, such a claim is a most extravagant one. I find such a signification neither within the literal terms of the agreement, nor sustained by any reasonable supposition as to the intention of the parties. The contract, in words, gives the right “without charge, to cross either or both of said railways, and to occupy and use, without charge, so much of the lands of the

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said party of the second part as may be necessary for that purpose." The whole privilege here granted is the privilege to cross the track, and to occupy and use the land necessary for that purpose; but this right of passage does not embrace anything but the railroad track, and the land appertaining to such track. It would be altogether unreasonable to deduce from such terms as these, that it was the understanding of these parties that this railroad company should have the enormous privilege of crossing with its road not only the track of the other company, but also over all lands and structures used in connection with its road. Is it rational to assert that the Morris and Essex company, when it entered into this compact, understood that it was to become vested with the right to construct its road, without charge, through the workshops of the other contracting party, or through its depots, however costly? And yet, such must be the right if the construction contended for is to prevail—and surely a right so exorbitant and oppressive cannot be raised up out of doubtful terms. It may well be doubted whether a power so unnecessary, so destructive of all fairness and equality in the bargain, could be enforced, except by the use of terms so clear and specific as to leave no room for speculation as to what was meant on the one side and on the other. The conventional privilege to cross the track of this company does not comprehend and carry with it the right to cross, without charge, its drilling-yard. So far, therefore, as the mere crossings of this main track at the points in question are concerned, the Delaware and Lackawanna Railroad Company is entitled to do such act without charge; but so far as it crosses lands used for other purposes than that of its main railroad track, it must make a reasonable compensation, to be ascertained in the usual manner. The result therefore is, that, in this respect, the decree should be reversed, and the contract in question, construed in the sense above indicated, should be decreed to stand confirmed in all respects, and to be specifically performed.

Neither party should be allowed costs in either court.

Midland R. R. Co. v. Hitchcock.

THE MIDLAND RAILROAD COMPANY, appellants,

v.

ANNA L. HITCHCOCK, respondent.

1. The complainant was the holder of a first mortgage bond of the defendant, and agreed to come in under a plan to re-organize the defendant by force of the statute; the bill alleged that the defendant, as re-organized, was about to issue to the other holders of such first mortgage bonds, its own bonds, but did not show that such new bonds were to be secured by a mortgage.—*Held*, that such statements did not lay a ground for equitable jurisdiction.

2. But as the bill alleged that defendant would not disclose to complainant what the plan of re-organization was—*Held*, further, that the right of such discovery laid a sufficient foundation to the suit.

On appeal from a decree of the chancellor, whose opinion is reported in *Hitchcock v. Midland R. R. Co.*, 6 *Stew. Eq.* 86.

For the facts of this case, see the chancellor's opinion reported in 6 *Stew. Eq.* 86.

Mr. John W. Taylor, for appellants.

I. There is a want of equity in the bill.

"An allegation in the bill that the plaintiff 'is informed,' or that he 'is informed and believes' that a certain material fact exists, is not a sufficient allegation of the existence of such a fact." *Cameron v. Abbott*, 30 *Ala.* 416; *Lucas v. Oliver*, 34 *Ala.* 626; *Walton v. Westwood*, 73 *Ill.* 125.

"But the fact should be positively alleged by the plaintiff in his bill." *Story's Eq. Pl.* (9th ed.) § 241, and note (a); *Egremont v. Cowell*, 5 *Beav.* 620-623; 1 *Dan. Ch. Pr.* (5th Am. ed.) *360; *Lord Uxbridge v. Stareland*, 1 *Ves.* 50-56; *Quinn v. Leake*, 1 *Tenn. Ch.* 71.

II. The complainant has an adequate remedy at law.

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III. The complainant should have made the Central Trust Company and the present holder of the bond parties defendant, in order to equitable relief. By the complainant's bill, the Central Trust Company *appears to have the custody or possession of the bond*, and it should certainly be made a party.

Mr. Geo. R. Brown, for respondent.

I. As to want of equity. *Story on Agency* (8th ed.) 109, § 85; *Jeffery v. Bigelow*, 13 Wend. 518; *Story on Agency*, § 127; *North River Bank v. Aymar*, 2 Hill 375; *Johnson v. Jones*, 4 Barb. 369; *Van Hook v. Somerville Manuf. Co.*, 1 Hal. Ch. 633; *Gulick v. Vroom*, 2 Vr. 182; 5 Vr. 463; *Nicholson v. Janeway*, 1 C. E. Gr. 285; *Law v. Stokes*, 8 Vr. 249; *Hunter v. Hudson River I. & M. Co.*, 20 Barb. 493; *Medbury v. Erie R. R. Co.*, 26 Barb. 564; *Dunning v. Roberts*, 35 Barb. 436; *Wilbeck v. Schuyler*, 44 Barb. 469, 31 How. Pr. 97; *Mechanics Bank v. N. Y. & N. H. R. R. Co.*, 13 N. Y. 599; *North River Bank v. Aymar*, 3 Hill 362; *Farmers Bank v. Butchers and Drovers Bank*, 14 N. Y. 627; *Griswold v. Haven*, 25 N. Y. 565; *Exchange Bank v. Monteith*, 26 N. Y. 506; *Bank of New York v. Bank of Ohio*, 29 N. Y. 619; *President &c. v. Comen*, 37 N. Y. 320; *Armour v. Mich. Cent. R. R. Co.*, 65 N. Y. 111; *Welsh v. Hartford Fire Ins. Co.*, 73 N. Y. 5; *Walsh v. Gilbert*, 2 Hun 58.

II. Defect of parties. The bill makes all persons parties who had or appeared to have any possible interest in the matter; it includes the individual members of the re-organization committee, and the new company formed under the plan of re-organization. There is no allegation in the bill showing any other person having an interest; on the contrary, the complainant is the only person who has.

III. Remedy at law. The complainant clearly had no remedy at law. She had only an equitable interest in the property and

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franchises of the New Jersey Midland Railroad Company or the proceeds thereof. The property sought to be reached in this suit, so far as we know, is not in existence. A bond of the new company "to be issued" in the place of those in the old. The old bond was deposited for a certain purpose—that purpose, to obtain a new bond.

The opinion of the court was delivered by

BEASLEY, C. J.

I agree with the chancellor in the view which he takes of the merits of this case as the same are stated in the bill.

My only difficulty has been with respect to the equitable foundation of the proceeding. The facts are detailed in the opinion of the chancellor. The bill is clearly defective, as it leaves it greatly in doubt whether or not the bond which the complainant claims the right to have issued to her by the company is a bond that is to be secured by a mortgage. If this, in point of fact, be the case, then it is plain that on this ground the matter in dispute is one for equitable cognizance. But if, on the other hand, the obligation on the part of the railroad company is to deliver a naked bond, unsecured in any way, to the complainant, in consideration of the bond surrendered to it by her, then it seems plain to me that a suit at law would be the only remedy. In such latter instance, an actual breach of the implied contract would afford the complainant plenary redress. But although this bill is thus deficient in this particular, nevertheless there is an indication in it that the bond in question is a mortgage bond, for in the charging part it charges that the complainant is entitled to "a mortgage bond of the said Midland company," in lieu of the one surrendered by her. Yet, such a charge standing isolated in the bill, without being supported or justified by any precedent statement, would not sufficiently exhibit the existence of a jurisdictional fact. I am not able to see how the cognizance of equity over the case can be sustained on this ground.

However, I have come to the conclusion that it was proper to

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sustain this bill against this demurrer, for the reason that the complainant has a right to a discovery of the plan on which the new company was re-organized. In her bill, the complainant alleges that the committee or trustees entrusted with the carrying out of the plan or agreement of re-organization, approved of an assumption, compromise or settlement of the debts, claims or liabilities of the said New Jersey Midland Railway Company, but upon what particular or general terms they refuse to inform this complainant. It is clear, I think, that the complainant is entitled to this information, and it is also clear that this court cannot say whether her rights are legal or equitable until such discovery shall have been obtained. It is highly probable that the holders of the first mortgage bonds of the old company were to have similar bonds from the new company, and if such was the plan on which the new company was to be constituted, then, as has been said, the complainant has presented her case to the appropriate forum. This right to a discovery affords a basis on which this proceeding may be rested. I shall, therefore, vote to affirm the decree.

Decree unanimously affirmed.

ANDREW D. CAMPBELL, appellant,

v.

J. FRANK FORT, executor, respondent.

Mr. A. M. Hassell, for appellant.

Mr. Joseph Coult, for respondent.

PER CURIAM.

This decree unanimously affirmed. No opinion was filed in the court of chancery.

M. & E. R. R. Co. v. Zabriskie.

THE MORRIS AND ESSEX RAILROAD COMPANY, appellant,

v.

LANSING ZABRISKIE, respondent.

Mr. J. D. Bedle, for appellant.

Mr. Lansing Zabriskie, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the chancellor in the case below. 6 *Stew. Eq.* 22.

ALEXANDER GRAY, appellant,

v.

JOHN GRAY et al., respondents.

Mr. G. D. W. Vroom and *Mr. Peter L. Voorhees*, for appellant.

Mr. E. E. Green and *Mr. Barker Gummere*, for respondents.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the ordinary in the case below. 5 *Stew. Eq.* 692.

Harrison v. Cooley.

WILLIAM H. HARRISON, appellant,

v.

JOSHUA S. COOLEY, respondent.

Mr. William B. Guild, for appellant.

Mr. Joseph Coult, for respondent.

On appeal from a decree of the chancellor based on the following opinion of Henry C. Pitney, esq., advisory master :

This bill is filed by a judgment creditor of the firm of Hall & Harrison, composed of Albert F. Hall and Reuben M. Harrison, in aid of an execution levied on goods and chattels once confessedly owned by the execution debtors, but now claimed by William H. Harrison, brother of R. M. Harrison, under two bills of sale, one from Hall to R. M. Harrison, and the other from R. M. Harrison to W. H. Harrison.

The question is as to the validity of the title of W. H. Harrison as against the creditors of the firm, particularly the complainant.

The complainant contends that the sale from the firm to William H. Harrison was fraudulent and void as against him and other creditors in his situation. The defendants deny the fraud, and put themselves upon the *bona fides* of the transaction, which is the sole question litigated.

At the close of the argument, I expressed a decided opinion that the conveyance from Hall to R. M. Harrison and from R. M. Harrison to W. H. Harrison was a bald and transparent fraud as against Hall, and would be set aside if complained of by him. At the same time, I felt grave doubt as to whether the complainant could take advantage of it, and took further time to consider, which having done, and after going over the whole case carefully, have now to state my conclusion.

The property conveyed included all the property of the partners, and, as now alleged, all debts due them. Neither has any

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other property of any kind. Its conveyance to W. H. Harrison leaves them without means to discharge their indebtedness to complainant except an uncertain and remote interest in a stock company, which I stop here to say amounts to nothing.

As to the value of the property conveyed, Hall made up a statement of the affairs of the partnership on three separate papers. The first paper was a list of machinery and stock on hand—not produced. The amount appearing clearly from other papers is \$2,475.98. (From this paper the list of articles sold in the bill of sale was taken. It was in the handwriting of Provost, who was W. H. Harrison's attorney, and, as is said, cannot be found). This amount was made up of original machinery purchased by this firm and other articles added.

Second paper, *Exhibit No. 1*, contains statements of accounts due, but the addition, \$293.59, is erroneous, and has misled defendants and their counsel.

The gross amount of accounts due is.....	\$488 90
Small items not on last paper.....	6 24
	<hr/>
	\$2,971 12

From this amount allowances were made, as testified by Hall, and shown by figures on back of <i>Exhibit No. 2</i> , as follows: Difference in value of machinery (items of this are on back of <i>Exhibit 2</i>).....	\$64 00
Bad accounts (this shows also on back of <i>No. 2</i>),	74 16
Difference in Churchill work (items also on back of <i>No. 2</i>).....	80 05
Vise.....	4 00
	<hr/>
	222 21

	<hr/>	\$2,748 91
Amount after deductions.....		2,748 91
Then was added (for what does not appear),		50 00
	<hr/>	\$2,798 91
Then was deducted (for what does not appear),		250 00
	<hr/>	\$2,548 91

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From all the evidence, I think this a fair valuation of the goods and accounts as a going concern.

The third paper, *Exhibit No. 2*, shows the debts.

Their total is.....	\$1,291 16
(Not including the debt of the complainant), adding complainant's debt.....	930 00
Total debts are.....	\$2,221 16
Assets.....	2,548 91
Balance of assets.....	\$327 75

The firm was in that condition which may be considered insolvent for purposes of equity ; that is, unable to pay their debts if called upon suddenly—unable to meet their obligations, except by the grace of creditors—but not insolvent in the sense of not being worth enough to pay their debts.

This indebtedness consisted of chattel mortgage and

rent to Hall's estate.....	\$695 86
Open accounts.....	416 30
Tucker, cash loaned.....	150 00
Unknown	29 00
Total, except complainant's.....	\$1,291 16
Complainant's.....	930 00
In all.....	\$2,221 16

CIRCUMSTANCES OF THE CONVEYANCE.

Hall, desiring to sell out, spoke to W. H. Harrison to take his place in the firm, in the last of January or first of February, 1880. W. H. Harrison asked for statements, and those above referred to were made out. The complainant's debt was not on the statements. Then there was a consul-

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tation between the three, and a brother, Charles Harrison, who was to furnish the money to W. H. Harrison. Hall asked \$1,200 for his interest in the business, W. H. Harrison to pay all the debts except complainant's; that is, \$600 for his half. W. H. Harrison declined, and then further negotiations were carried on through R. M. Harrison. Hall testifies that R. M. Harrison told him that W. H. Harrison would pay \$300, or \$150 each, and assume complainant's debt—\$900—which was in effect the same as Hall had offered. Hall accepted, and the papers were to be made out. This was done by W. H. Harrison's orders, and two deeds were prepared, one from Hall to R. M. Harrison, and one from R. M. Harrison to W. H. Harrison. The first was dated February 12th, the other February 20th. Both were written at once, and in the same handwriting. The consideration of one \$150, the other \$1,600. The parties met at the shop; \$120 were paid by W. H. Harrison to Hall (\$30 retained to pay a workman), and Hall executed a bill of sale. This he understood to be a part of the sale from the firm to W. H. Harrison.

The three Harrisons then went to McCarter & Keen's office, and there R. M. Harrison executed the second bill of sale to W. H. Harrison. The consideration was as follows, as testified to by Hennion:

Debt of Hall's estate (chattel mortgage and rent).....	\$730 00
Old note of R. M. Harrison.....	659 00
Due-bill from W. H. Harrison.....	211 00
	<hr/>
	\$1,600 00

R. M. Harrison and W. H. Harrison swore that, the same evening after arriving home, the latter paid the former \$120, and gave a new due-bill for \$91. There is no other proof of this. It is contradicted by R. M. Harrison's admission to the complainant, and I am not satisfied it was paid.

R. M. Harrison continued in actual possession.

The fraud on Hall is palpable; the juggle of the two bills of

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sale and different considerations, show this. The contract between him and R. M. Harrison was that all debts, including the complainant's, were assumed by W. H. Harrison. This is confirmed by R. M. Harrison's affidavit, as follows :

Debt to estate of Hall.....	\$700 00
Other debts.....	400 00
Complainant's.....	600 00
	<hr/>
	\$1,700 00
Cash.....	300 00
	<hr/>
Value of property.....	\$2,000 00

The sale to W. H. Harrison was on a different consideration—leaving out the complainant's debt and paying R. M. Harrison with an old note, which W. H. Harrison declared under oath, on the stand, he considered worthless. Further, R. M. Harrison and W. H. Harrison say, by their answer, and swear on the stand, that book accounts were assigned as follows :

Amount of accounts due to firm.....	\$293 59
Book accounts due from the firm.....	398 31
	<hr/>
Difference	\$104 72

Say \$105, and that this balance of \$105, added to \$1,600, makes the amount actually paid \$1,705.

After the sale, Hall refused to turn over the books of account, and then R. M. Harrison released W. H. Harrison from his obligation to pay the debts of \$398.51, and took his note for \$105.

This, I am satisfied, was all a sham, and an after-thought got up to show a greater consideration for the goods sold, and is a confession that the consideration of \$1,600 is inadequate.

The lack of good faith is shown by an examination of *Exhibits 1* and *2*, from which the figures 398.31 and 293.59 are

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taken. Both are pencil footings—one of accounts due the firm, the other of debts due by the firm—and both are incomplete.

The accounts due the firm are.....	\$293 59
Items not carried out, but written.....	195 31
	<hr/>
	\$488 90

Debts on *Exhibit 2*, not included in Hall's estate :

Open accounts.....	416 30
To which add in pencil.....	150 00
	29 00

The transactions were understood by Hall, and rightly, too, to be a unit. R. M. Harrison introduces into it an element unknown to Hall, by which he receives back his old note as part of the consideration.

To take the edge off of this surrender of the old note as part consideration, W. H. Harrison and R. M. Harrison both swear that the old note was worthless. Avoiding Scylla they run into Charybdis, and show no adequate consideration.

W. H. Harrison swears he did not know of the complainant's debt.

R. M. Harrison swears to the same thing.

All Hall can state is that R. M. Harrison assured him that W. H. Harrison was to pay it. I can place no credence in the story of R. M. Harrison and W. H. Harrison. Contradiction between affidavits and answer and evidence—their manner on the stand—compels me to disbelieve them.

The figures on the back of *Exhibit No. 2*, are significant. These figures are in pencil, but not in Hall's handwriting :

2600
900
<hr/>
1700

The attention of counsel was called to them during the trial, but no explanation was offered. These papers were confessedly

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in W. H. Harrison's possession all the time, the affidavits and answers were prepared from them, and they were produced by his counsel.

Hall did not have the benefit of their inspection when sworn ; they were produced afterwards.

If there was any evidence that W. H. Harrison knew of complainant's debts, his denial would not satisfy me.

True, he says he considered the firm insolvent, and yet in buying their property he assumed all debts, and found margin for an old note of one of them for \$700.

On the accounts as he made them up there was a handsome margin due R. M. Harrison. This indicates very strongly that he did suppose there were other debts. Else how were they insolvent ?

But there is no evidence at all that he knew of it, except R. M. Harrison's statement to Hall.

The question is, then, *Was this transaction one which was void as to creditors at large ?*

There was no written assumption by W. H. Harrison of any debt, except the mortgage debt, and no proof of it available to creditors, except R. M. Harrison's evidence. Hennion's evidence is insufficient.

W. H. Harrison could produce the bill of sale against any creditor and show how he paid the \$1,600, as sworn to by Hennion, which included no debts except Hall's estate debt of \$700.

Now, the value of the property altogether was \$2,000 ; the equity conveyed not less than \$1,300, for which W. H. Harrison paid only \$150 in cash. This consideration I hold entirely inadequate. It does not amount to a *good* consideration. There must be a *bona fide* sale and a *good consideration*, both. *Sayre v. Fredericks*, 1 C. E. Gr. 209 ; 1 Story's Eq. Jur. 353.

It is very clear that R. M. Harrison intended to set creditors at defiance. His story that he had arranged to pay complainant with stock, is absurd and hurts his case.

The taking of his old note did not help him any. His brother was not pressing him, but complainant had a note just coming due which they could not meet. They killed several birds with

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one stone. He got clear of Hall, put the property in his brother's hands, where it would be just as valuable to him as in his own, and got it beyond the reach of the complainant.

It is hard to believe that W. H. Harrison did not participate in this scheme in all its length. He did participate so far as cheating Hall went. He now says he expected to pay all the debts, and did not know of complainant's debt.

I do not believe he meant to pay the unsecured debts on Hall's list, *No. 2*.

But whether he participated in the scheme to delay creditors, or not, the circumstances are such as to put him on his guard and bring him within the rule laid down in *Atwood v. Impson*, 5 C. E. Gr. 150.

He bought the goods—all the property—of a firm which he admits he knew to be practically insolvent, at a grossly inadequate price.

The payment in part by the individual partner's note for the whole assets of the shaky firm, was in itself a fraud on creditors, as I understand the rule laid down in *Metropolitan Bank v. Sprague*, by the chancellor and court of errors.

Chancellor Zabriskie says, (5 C. E. Gr. 30):

"A payment of individual debts out of partnership assets will not be set aside unless in case of insolvency, or when done in contemplation of insolvency, to give an improper preference."

He held the preference in that case good. The court of appeals thought he went too far in favor of such a transaction, and say, (6 C. E. Gr. 544):

"To exclude any presumption that the validity of that appropriation of the partnership funds is assented to, it may be well to say that in *Kirby v. Schoonmaker*, 3 Barb. Ch. 47, Chancellor Walworth held the contrary doctrine, and based it upon what seems to be sound reason."

Here the favoring of the individual creditor was done by that individual member of the firm without the knowledge of the other partner, and in the face of the agreement of the other part-

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ner, that all debts should be assumed—that is, R. M. Harrison agreed with Hall that the sale was on condition that all debts were assumed, and that he, R. M. Harrison, got the same as Hall. Instead of so carrying it out, he leaves complainant's debt out of the list assumed, and thereby leaves room for getting in his own individual debt. Such a sale Hall did not assent to, and W. H. Harrison knew that Hall did not assent to it.

Hall had a right to repudiate it, because he was left liable to pay this debt of the complainant, and as permitting assets to be disposed of for the benefit of the individual partner without his assent.

Such an equity in Hall, according to Chancellor Walworth, can be taken advantage of by their creditors. There are other authorities to the same effect.

I have examined the cases cited by defendant's counsel, and none go far enough to sustain this case. They all except the class of cases in which I think this is included. See, also, *Wilson v. Robertson*, 21 N. Y. 587, 592.

The case may be thus summarized :

Albert F. Hall made this bill of sale in good faith, upon the understanding that it was a part of a step in a sale by the two partners to W. H. Harrison at \$300, over and above all debts, which were to be assumed by him. In point of fact, the sale was not made on such terms as the defendants now contend, but on terms which not only did not assume all debts, but was for an inadequate consideration and included the payment of an individual partner's debt out of partnership assets, leaving the firm insolvent.

The actual arrangement was made for the purpose, on the part of the other partner, R. M. Harrison, of delaying and putting off his creditors, and if W. H. Harrison did not participate in it, he had notice of facts sufficient to put him on inquiry.

I think the complainant is entitled to relief.

PER CURIAM.

This decree unanimously affirmed.

Davis v. Howell.

WILLIAM M. DAVIS, assignee, appellant,

v.

JOSEPH HOWELL, assignee, respondent.

Mr. John F. Dumont, for appellant.

Mr. J. G. Shipman, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the chancellor in the case below. 6 Stew. Eq. 72.

EZEKIEL J. TUCKER, executor, appellant,

v.

UZAL A. TUCKER, respondent.

Mr. E. Q. Keusbey, for appellant.

Mr. Luther Shafer, for respondent.

PER CURIAM.

This decree unanimously affirmed, for reasons given by the ordinary in the case below. 6 Stew. Eq. 235.

CASES
ADJUDGED IN
THE COURT OF CHANCERY
OF
THE STATE OF NEW JERSEY,
OCTOBER TERM, 1881.

THEODORE RUNYON, ESQ., CHANCELLOR.

ABRAM V. VAN FLEET AND AMZI DODD, ESQS., VICE-
CHANCELLORS.

WILLIAM W. CONOVER

v.

ELISHA RUCKMAN et al.

Upon an original bill filed by an attachment creditor, a sheriff was enjoined from paying over certain funds in his hands. The court, *ex mero motu*, ordered the injunction to be dissolved because the funds were not attachable, but, on appeal, this order was reversed. Motion to dissolve the injunction, on the ground that the verification of the bill (which was general) was insufficient, denied; it appears that the averments of the bill as to the service of the attachment, are not denied by the answer, and that the validity of the attachment is shown to the court by subsequent satisfactory proof as to the service, inventory and return of the writ, and also by the allegations of the supplemental bill duly verified, and the admissions of the defendant in his

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amended answer. The question of the sufficiency of the attachment (the writ was served on the sheriff twice on the same day, before and after the funds came into his hands), reserved until the final hearing. An amendment to the answer, denying that the attachment created a lien, allowed, it appearing that defendant's counsel, on account of the first order determining that the funds were not attachable, had deemed such an averment unnecessary.

Creditor's suit. Original and supplemental bill. On motions to dismiss original bill for want of equity, to dissolve injunction, and on petition for leave to amend answer to original bill.

Mr. J. Weart, for the motions.

Mr. C. Robbins, contra.

THE CHANCELLOR.

The original bill was filed to obtain the aid of equity to support and enforce the complainant's claim as a creditor of Elisha Ruckman upon the proceeds of the sale of mortgaged premises in a foreclosure suit in this court, brought by his wife on a mortgage given by John Dorn to her. The complainant's debt is by simple contract, but he claims to have obtained a lien for it by means of a foreign attachment against Ruckman, which was served on the sheriff who held the execution in the suit on the mortgage. He insists that the proceeds attached were, at the time of the attachment, really the property of Ruckman; that the mortgage-money was lent by him to Dorn, and the mortgage taken to Mrs. Ruckman without her knowledge or consent, and merely to defraud his creditors. On the filing of the bill an injunction was granted, restraining the sheriff from paying the money to her or to any one else, except to pay it into this court. A motion was made to dismiss the original bill for want of equity; but while it failed because, according to the then existing practice (since changed, however, by *Rule 210*), the objection of want of equity could only be taken by demurrer, the court, *ex mero motu*, dissolved the injunction, on the ground that the complainant had no lien, because the moneys attached were

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moneys in the hands of a sheriff, raised by him in pursuance of a decree of this court, and therefore not the subject of attachment. *Conover v. Ruckman*, 5 *Stew. Eq.* 685. The order of dissolution was made July 2d, 1880. The complainant appealed from it, and in November term following it was reversed on the ground that the moneys were subject to attachment. *Conover v. Ruckman*, 6 *Stew. Eq.* 303. Mrs. Ruckman filed her answer to the original bill, August 2d, 1880, after the order of dissolution was made, and before its reversal. The order of reversal was made the order of this court, December 28th, 1880. On the 2d of August, 1881, the complainant, by leave, filed his supplemental bill. In the original bill, the issuing of the attachment is stated, and it is alleged that the coroner, "by virtue thereof, on the 28th of May, 1880, in due form of law attached all the rights and credits of Ruckman under and by virtue of or in any way arising out of the execution." The supplemental bill states the particular manner in which the attachment was served; that it was served twice, but both times on the same day, and before the return of the writ of attachment; the first time, before the money was paid to the sheriff, and the next time, a short time after it was paid. Mrs. Ruckman now moves to dismiss the original bill for want of merits; failing that, for leave to amend her answer thereto (which, it should be stated, is wholly silent as to the service of the attachment), by adding a statement that the attachment was indeed served, but was served before the money was paid to the sheriff, and denying that the complainant thereby obtained any lien; and she moves also for a dissolution of the injunction on the ground that the original bill was not duly verified; and failing that, on bill and answer as amended, if the motion to amend the latter be granted. By consent of counsel, and for convenience and economy, the motions are all heard together, and the motion to dissolve on bill and answer is argued and to be decided as if the amendment, if allowed, were duly made.

Evidently the only question decided on the appeal was, whether money in the hands of a sheriff, raised by him under a decree of this court, is attachable. The appellate court neither

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dealt with nor entertained any other question. It passed, however, by incidental reference, upon the case made by the bill, saying that, if sustained by the evidence, it is one which commends itself to the consideration of a court of equity for the relief sought, if it can be granted consistently with the rules and practice of the court. Mrs. Ruckman did not demur to the bill, but after her motion to strike the bill from the files for want of merits was denied, answered it. The motion to dismiss must be denied, not only on this ground, but on the ground that the bill is not deficient in statement, and, judged by its averments, is a meritorious one.

As to the motion to dissolve on the ground of insufficient verification: The deficiency specified is the failure properly to verify the fact that the attachment was served. It is merely verified by the oath of the complainant, that he verily believes that the facts, matters and things stated in the bill, so far as they relate to the acts and deeds of other persons than himself, are true. Mrs. Ruckman has, as before stated, answered the bill, and the answer is silent as to the service of the attachment. Those facts would not of themselves alone preclude her from taking advantage of the want of sufficient verification of any material fact stated in the bill. *Perkins v. Collins*, 2 Gr. Ch. 482. The verification by the affidavit of the complainant attached to the bill is indeed not sufficient, but it appears, by the recital of the order dissolving the injunction entered in behalf of Mrs. Ruckman, that the fact and manner of service of the attachment were, when the motion to dismiss was made which resulted in the order dissolving the injunction, before the court by other evidence than that of the bill and its verification, for the inventory of the rights and credits attached, is recited *verbatim*. It must have been copied into the order from the inventory itself, which must consequently have been before the court, and could only have been so by consent. Further, some of the complainant's testimony has been taken, and among the witnesses sworn and examined is the coroner who served the writ of attachment, who testifies to the service, and the writ and inventory and return have been put in evidence. An injunction

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will not be dissolved where auxiliary evidence of the complainant's right is before the court, sufficient to sustain the bill, even though its material averments are denied by the answer. *High on Inj.* § 900; *Orr v. Littlefield*, 1 Woodb. & M. 13; *Christie v. Griffing*, 9 C. E. Gr. 76. In this case, then, as it stands before amendment of the answer, the answer does not deny the fact of the service, and there is evidence in the cause establishing it. Again, the supplemental bill states the fact that, after the filing of the original bill, the money due on the execution in the foreclosure suit was paid, and that the coroner again served the attachment on the sheriff, levying on the money, and afterwards made his return of his service of the writ. This is duly verified. The filing of a supplemental bill does not put an end to the injunction issued on the original bill. *Joyce on Inj.* 298; *D'Arcy v. Sumner*, 2 Moll. 359. And an injunction bill may be amended even after motion to dissolve, and if, when so amended, it shows sufficient cause for continuing the injunction which is not overborne by the defendant, it will be continued and a motion for dissolution, on the ground of defects in the original bill, will be overruled where those defects have been remedied by means of an amended bill which does not change the cause of action. *High on Inj.* § 997; *Crawford v. Paine*, 19 Iowa 172; *Sweatt v. Faville*, 23 Iowa 321. So that, in view of the supplemental bill, and without reference to the fact that the defect of verification in the original bill is remedied by the proof in the cause, the motion to dissolve for want of verification could not prevail. But still further, the amendment to the answer admits the service, but states that it was made before the money was paid. The injunction will not be dissolved because of an insufficient verification, when the defendant by answer admits the unverified facts. But there is still another ground on which the motion is based. Mrs. Ruckman insists that the attachment was premature, the service having, according to the original bill, been made before the money was paid to the sheriff. On the other hand, it is urged by the complainant that according to the supplemental bill the service was also made after the money had been paid. To this it is rejoined that the money was not, in fact,

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paid at the time of the second service, but the sheriff held only a bank-check for it, which cannot be regarded as money. The court of errors and appeals, though it did not pass upon the question whether the service, if made before the money was paid to the sheriff, was premature, referred to it indeed as one not without difficulty. But it would not be just to construe this reference into an expression of opinion that the question is one of doubt, for the court expressly says that it neither has examined nor considered it. But the supplemental bill places before the court the fact that a very short time after the first service, and on the same day, and before the return to the attachment was made, the coroner served the writ on the sheriff after the latter had, as he says, received the money. It is true he received payment by check, but he says he accepted it as payment, and did not even adjourn the sale, as he would have done had he been unwilling to accept the check as money, and as he was requested to do by Mrs. Ruckman's solicitor. He says he considered the check as good as gold, and accepted it as payment to all intents and purposes. The question, as the case stands, should not be disposed of on this motion, but should be reserved for the final hearing. The motion to dissolve will therefore be denied, with costs.

The application to amend the answer to the original bill should be granted. It appears that the only reason why Mrs. Ruckman, in her answer, did not deny that the attachment created a lien, was, that the court had, as before stated, when the answer was put in, previously decided that the complainant had obtained no lien by means of the attachment, and her counsel, therefore, considered it unnecessary to insert any such denial in the answer. That is clearly sufficient ground for allowing the amendment.

Reilley v. Roberts.

CAMILLA REILLEY

v.

JOSEPH E. ROBERTS et ux.

1. In an exchange of lands, the defendant agreed to cancel certain judgments which were liens on part of his premises, and to secure the difference between the properties in value (\$3,000) by giving complainant a first mortgage on a farm in Delaware, the value of which he grossly exaggerated. He made provision for satisfying the judgments, but never in fact did so, and they are still uncanceled of record. The Delaware mortgage was a second mortgage. It was accompanied by another mortgage, on lands in this state, which he misrepresented as to quantity, to indemnify complainant for loss under the Delaware mortgage. The Delaware property, on a subsequent foreclosure, produced only enough to pay the first mortgage on it. Complainant sold the property covered by the judgments, and warranted the title.—*Held*, that she is entitled to specific performance of the agreement as to canceling the judgments, and also to relief on account of defendant's false and fraudulent representations as to the mortgages, and the \$3,000 were therefore declared a lien on the premises conveyed to defendant, subject to prior *bona fide* encumbrances.

2. Complainant's claim of damages for defendant's failure to perform his contract, cannot be sustained in equity. The remedy is at law.

Bill for relief. On final hearing on pleadings and proofs.

Mr. H. A. Drake and *Mr. J. Wilson*, for complainant.

Mr. B. D. Shreve and *Mr. P. L. Voorhees*, for defendants.

THE CHANCELLOR.

The complainant seeks, by means of this suit, to compel the defendant Joseph E. Roberts to cancel of record certain judgments against him, which are liens upon land in Camden, conveyed by him to her in an exchange between them, and to obtain a lien on the real property conveyed by her in the exchange for \$3,625 of the money he was to pay her as part of the consid-

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eration. The exchange was made in January, 1878. The property conveyed by her was a lot of land in Atlantic City, on which was a large house then known as the "Beaumont House," and the furniture therein, except certain articles. The property was then used by her as a boarding-house in summer and as a residence in winter. The property conveyed by him was certain houses and lots in Camden, all of which were subject to encumbrance, both by mortgage and judgment, but he was to convey it to her free of all encumbrance except the mortgages which were specified in the written agreement between them. There was a difference of \$3,625 in her favor, in the valuations of the properties. For this sum he was to give her his bond, payable in one year, to be secured by a mortgage (to be the first encumbrance) on a farm of his, of about eighty-five acres, in the state of Delaware. There was already a mortgage on that property, but he bound himself to cancel it of record before the time fixed for the exchange, or to pay her the amount of it. He did neither, but gave her a bond and mortgage made by his brother-in-law, James C. Jaquett, on a tract of land, said in the mortgage to contain five hundred and fifty-six acres, known as the Forkbridge tract, in Shamong township, in Burlington county, to indemnify her against all loss or damage which she might sustain by reason of the insufficiency of the Delaware land to pay her mortgage. By the agreement between them, it was stipulated that the conveyance of her property was to be made to Roberts and his wife. It was, in fact, made by Roberts's procurement to his wife alone. He did not convey his property to the complainant free from all encumbrance except that of the mortgages thereon, but some of it, at least, was subject to the lien of four judgments which had been recovered against him, three by David H. Wolf and the other by Henry Robbins; and though he appears to have made provision for satisfying them, yet he did not, in fact, do so, but gave to her only the agreement of his attorney, who held the Wolf judgments by assignment, not to look to the property conveyed to her for the payment of the judgments, or in any way to disturb or molest her or any of her grantees or any occupant of the property, for or by reason

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of the judgments. As to the other judgment, provision appears to have been made for paying it, but payment was deferred because, and only because, of a dispute between Roberts and the plaintiff therein as to the amount due thereon, but no release or covenant not to sue was given to the complainant. Though in the answer it is said that the property was, before the filing of the bill, released from the Wolf judgments, there is no evidence of it, and Roberts, in his testimony, admits that the four judgments are still uncanceled of record. The complainant has sold all the Camden properties, and is bound by her warranty thereof to protect the title against the judgments. She is entitled to a decree for specific performance of the agreement with respect to them. As before stated, the agreement was that defendant should convey the property to her free from all encumbrances except the mortgages. Although it appears that her attorney passed the title to the property conveyed to her, and was satisfied with the covenant not to sue as to the Wolf judgments, and the fact that Roberts' attorney held in his hands the money to satisfy the other one, that does not disentitle her to the specific relief of having her property cleared of the encumbrance of the judgments.

The principal contest in the case is on her claim to a lien upon the Atlantic City property for \$3,625. Since this suit was begun, the Delaware farm has been sold under foreclosure of the first mortgage thereon, and, at the judicial sale under the foreclosure, it was bought in by the complainant's husband for \$695, the amount, or very near it, of the first mortgage. Whether the complainant is entitled to the lien she claims, depends on the decision of the disputed question whether Roberts defrauded her in inducing her to accept, as security for the \$3,625, the Delaware mortgage and the mortgage on the Fork-bridge tract, for if he did, it is within the power of this court to protect her against the consequences of his fraud, by charging the amount upon the Beaumont House property. It appears quite clear that she would not have taken that security unless she had been satisfied that the property mortgaged was abundant security. She knew that she would need the money to take up

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the encumbrances on the property received by her in exchange, all of which, as before stated, was subject to mortgage, and the mortgage on each property amounted to a very considerable part of the value. It is most manifest that she was led to believe, and was persuaded by Roberts, that the Delaware mortgage would be a most available security—one readily convertible into cash—and that had she not confided in his representations on that head, and especially as to the value of the property, she would not have taken it. She testifies that, in a conversation between them, on the 2d of December (the agreement for exchange is dated the 12th), she told him she had seen his properties, and that she would not take so much encumbered property; that she must have four of the houses clear, so as to enable her to pay the debts on the others; that he said that, though he was a rich man, he had not then the ready cash to clear them, as he had been building twenty-four houses, and that had taken all his spare cash, but that he had a valuable farm of eighty-seven acres, in Delaware, which was worth \$8,500; that he had seen it, and knew what it was worth, and that it had paid him ten per cent. of that amount ever since he had owned it; that he would give her a mortgage on it for the amount (\$3,500) needed to clear four of the small houses, and with the mortgage would give his own and his wife's bond, to secure the payment of the money at the end of a year, or whenever the mortgagees (of the four houses) should demand their money; or, if she preferred it, would make the bond payable in six months; that she proposed to him to give her a mortgage of \$6,000 on the Beaumont House property (which was unencumbered), she to take the rest of the price of her property in encumbered property, but he declined, saying he wanted her property clear, so as to obtain money on it; that it being so near home, he could get money on mortgage on it more readily than he could on the Delaware farm. And she says he also said that there was a small mortgage of somewhat over \$500 on the farm, but he would clear that off and give her a first mortgage. She further testifies that she then told him how she was situated—that she had three small children; that her husband was in delicate health, and that she was depending

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on her property (the Beaumont House) for her support; that she made enough there in the summer time to keep her family the whole year round; that it was a vital matter to her, and that if he could not pay the mortgage on demand, he should say so. She says he gave her assurance of his ability to do so, and named persons of whom, in case of his failure to do it out of his own means, he could readily obtain money on that investment. Relying upon his representations, she agreed to make the exchange. Between that time and the time when the agreement was signed, she was advised by her lawyer to make inquiry about the farm, and she sent her husband to Delaware on the errand. In Wilmington he was credibly informed that there was no farm in the locality of the farm in question, worth the half of \$8,500. On obtaining this information, she sent for Roberts, and told him what she had learned—that the farm was not worth \$8,500, as he had represented it to be, and he replied that it was, and he could prove it, and that he would like to know who had given her such wrong information. She told him, but he still insisted that the farm was worth \$8,500. She, however, was unwilling, in view of the information just referred to, to make the exchange, unless he would give her more security, and he proposed to give her, as additional security, a second mortgage on a house in Broadway, Camden, or a first mortgage on a tract of land of five hundred and sixty acres (as he said), in Shamong township, Burlington county, which he said he could control, and which he said was worth \$4,000. He gave her a reference to ascertain the value of that tract. She inquired of the person to whom he referred her, who informed her that the tract was of the value he had fixed upon it, and she then agreed to make the exchange, and it was made accordingly. Although he denies the truth of her testimony on the subject of the representations which she says were made by him to her as to the value of the farm, and his personal knowledge on the subject, and also as to his statement as to the contents of the Forkbridge tract—that it contained five hundred and sixty acres—she is corroborated and he is not, and the great weight of the testimony is in her favor. The statements which she and her husband and Helena Baulig all

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say were made by him to her on the subject of the value of the farm, as to what he paid for it, his personal knowledge of its value and the annual income he had received from it, are admitted to be untrue, and they were all substantial important misrepresentations of existing facts materially affecting the character and value of the mortgage. *Perkins v. Partridge*, 3 *Stew. Eq.* 82. So, too, as to the contents of the Forkbridge tract. It contains only about three hundred and fifty acres, instead of five hundred and sixty. On the subject of this representation, the mortgage itself and the bond which it was given to secure are strong corroboration of the complainant's testimony. Both state the contents to be five hundred and fifty-six acres, and both appear, judging from the handwriting, to have been drawn by Jaquett himself, who, as the owner of the property, must have been aware of its true contents. His deed informed him. And here it will be convenient to dispose of an objection made to the testimony of Helena Baulig and Mr. Reilley, both of whom speak as to the representations. The defendants insist that the testimony of these witnesses given on recall should be stricken out, because they were re-examined without an order from the court; but as to the former, when she was called to the stand the second time, she was not examined as to the same matter as to which she had testified previously, but on an entirely different one; and as to both, their re-examination was not objected to when they were sworn, and therefore objection to it now will not be sustained. *Osborne v. O'Reilly*, 7 *Stew. Eq.* 60. It will be proper here to take notice of a contrariety in the testimony as to the object of giving the Forkbridge mortgage. Roberts insists that it was given in consideration that he was not to be required to pay off the first mortgage on the farm, while, on the other hand, the complainant insists that it was given merely as additional security, because she was not satisfied of the truth of his representations as to the value of the farm, and that he was not, by the giving of it, absolved from his agreement to pay off the first mortgage. The defendants further insist that the complainant is bound by the statements of her bill on that head, which are that it was given as indemnity against the first mortgage.

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I do not deem the matter essential to the decision of the cause. The bond which that mortgage was made to secure, however, declares by its recital the purpose for which it was given—the better securing of the payment of the debt which the mortgage on the farm was given to secure—and the same purpose appears from the condition of the bond. It should be stated that Roberts, in about three months after the exchange, put a mortgage of \$6,000, still unpaid, upon the Beaumont House property, and when called upon by the complainant for payment of his bond to her, declared his inability to pay, and has never paid her. The mortgage on the Delaware farm was given for the whole difference, \$3,625, between the value of the Beaumont House property and furniture and the estimated value of the Camden properties as fixed by the parties. It is impossible to resist the conclusion from the evidence that the complainant was induced, by the fraudulent representations of Roberts, to accept the mortgages in question. He makes no effort whatever to show that the Delaware farm and the Forkbridge tract were even adequate security for the \$3,625. At judicial sale, the farm brought only \$695, the amount of the first mortgage and costs, and there is no evidence that it would have brought any more at the time when the exchange was made. Roberts admits that he told the complainant that the mortgage would be just as good on the farm as it would be on the Beaumont House property. The contents of the Forkbridge tract are not so great by some two hundred acres as Roberts represented. The complainant is entitled to relief from the consequences of his fraud as far as it can be equitably accorded. Though his wife holds the title to the Beaumont House property, she evidently never paid any consideration for it. The fact that she holds the title will not, under the circumstances, prevent charging it with a lien for purchase-money. The \$3,625 and the interest due thereon should be charged upon that property (subject to the \$6,000 mortgage already thereon), and so much of the furniture which passed therewith by the exchange as is still in the possession of and owned by the defendants. Roberts will be decreed to specify

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cally perform his contract to remove the encumbrance or cloud of the judgments from the Camden property and to pay costs.

The complainant's claim for damages, by reason of Roberts's failure to perform his agreement with her, cannot be sustained. That cause of suit does not belong to this forum. *Izard v. May's Landing Co.*, 4 *Stew. Eq.* 511; *Palys v. Jewett*, 5 *Stew. Eq.* 302.

JOSEPH I. THOMPSON

v.

AARON W. TILTON.

By a written agreement for the exchange of lands, the complainant was to secure to the defendant for his (defendant's) use, one-half of the rye then growing on complainant's land (which was under lease), and by a simultaneous verbal agreement, the growing wheat thereon was reserved to complainant's tenant then on the premises. The deed, which was afterwards given, was a warranty deed, and contained no reservation of the crops at all, because the scrivener regarded it as unnecessary. The defendant, denying the tenant's claim to the wheat, converted it to his own use, whereupon the tenant recovered a judgment against him for its value. Then the defendant recovered a judgment at law in respect thereof, against complainant, for breach of covenant in the deed, and on that judgment a writ of error by complainant is still pending.

Held, that complainant having conclusively shown that the wheat was reserved at the time of the exchange, may restrain defendant from further proceeding on or enforcing his judgment at law, and that such right has not been lost by his laches.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. D. Bedle, for complainant.

Mr. W. H. Vredenburg, for defendant.

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THE CHANCELLOR.

The complainant, by his bill, seeks relief with respect to a contract, and the deed given by him in pursuance thereof, made in December, 1875, between him and the defendant for an exchange of properties. The complainant's property was a farm of about forty-two acres, in Monmouth county, which was then in the hands of a tenant (an under-tenant), under a lease made by him. Part of it (about thirteen or fourteen acres), had been sown by the under-tenant with wheat, and another part, of about the same size, with rye. By the written agreement between the parties, the complainant agreed to secure to the defendant, for his own use, half of the ryë; but the instrument is silent as to the wheat. The defendant entered into possession of the farm in pursuance of the exchange and under his deed, in the spring of 1876. The deed conveyed the property in fee simple with general warranty, and made no reservation of the crops or any part of them. The defendant, after entering into possession, denied the right of the under-tenant or his assignees to the wheat crop,

NOTE.—A conveyance of lands carries therewith the growing crops, *Terhune v. Elbersson*, Pen. *726; *Waugh v. Waugh*, 84 Pa. St. 350; *Budworth v. Hunter*, 9 Rob. (La.) 256; *Talbot v. Hill*, 68 Ill. 106; *Chapman v. Long*, 10 Ind. 465; *Crews v. Pendleton*, 1 Leigh 297; *Pratte v. Coffman*, 27 Mo. 424; *Engle v. Engle*, 3 W. Va. 246. See *Evans v. Williamson*, 43 L. T. Rep. (N. S.) 719, 23 Alb. L. J. 400; *Edwards v. Ranier*, 17 Ohio St. 597; and the grantor's possession subsequent to the deed does not affect it, *Wilkins v. Vashbinder*, 7 Watts 378; *Tripp v. Hasceig*, 20 Mich. 254; *Brooks v. Hyde*, 37 Cal. 366; *Pickens v. Reed*, 1 Swan 80.

A sale of land by the landlord during a tenancy for years, and a subsequent sale of his portion of the crop by the landlord to a third person, gives neither the purchaser of the crop, as against the vendee of the land, title to the landlord's share, nor the vendee of the land title to the tenant's share, *Moffett v. Armstrong*, 40 Iowa 484; *Gibbons v. Dillingham*, 10 Ark. 9; *Adams v. Leip*, 71 Mo. 597. See *Pfanner v. Sturmer*, 40 How. Pr. 401; *Hadley v. Barton*, 47 How. Pr. 481; *Jenkins v. McCoy*, 50 Mo. 348; *Pickens v. Reed*, 1 Swan 80.

A demise by a landlord who had purchased a former tenant's emblements, passes them, *Copley v. Enright*, 7 Irish C. L. 393; *Carnagy v. Woodcock*, 2 Munf. 234; unless reserved, which may be by parol, *Youmans v. Caldwell*, 4 Ohio St. 71.

A grantee's parol promise to pay the consideration to a third person, is good, *Rice v. Carter*, 11 Ired. 298; *Simonton v. Gandolfo*, 2 Fla. 393; *Mason v. Ma-*
403 3 Bush 35; *Raynor v. Lyons*, 37 Cal. 452; *Lee v. Newman*, 55 Miss. 365.

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and, claiming it as his own under the deed, took it for his own use. The under-tenant's assignees brought suit at law against the defendant, and recovered a judgment for the value of the crop. The defendant then sued the complainant for damages under the covenant of warranty, and recovered a judgment against him therefor, which is now pending on writ of error brought by the complainant. The complainant asks that the reservation of the wheat crop may be declared to be part of the agreement, and of the deed from him to the defendant, and that the defendant may be restrained from taking any action to affirm that judgment and from collecting it. The proof that the wheat crop was reserved for the under-tenant was very clear. He was entitled to both crops, and the defendant so understood it when the agreement was made. The complainant swears that on the occasion when the bargain was concluded, the defendant approached him on the subject of the exchange, and he expressed his willingness to make it; that the defendant then said that the under-tenant had all the place sown

See *Sherburne v. Fuller*, 5 Mass. 133; *Price v. Sturgis*, 44 Cal. 591; *Cooper v. Landis*, 75 N. C. 526.

But not vendee's parol promise to sell the land and credit any profits on such sale on an indebtedness to him, *Kidd v. Carson*, 33 Md. 37. See *Troxbridge v. Wetherbee*, 11 Allen 361.

A grantee in a deed may show a parol agreement, contemporaneous with his deed, to pay off a mortgage on the premises, *Tuinter v. Hemmingway*, 18 Hun 458; *Murray v. Smith*, 1 Duer 413; *Tveridick v. Mumford*, 31 Mich. 467; *Pitman v. Conner*, 27 Ind. 337; *Thomas v. Hammond*, 47 Tex. 42; *McDill v. Gunn*, 43 Ind. 315; *Negley v. Jeffers*, 28 Ohio St. 90; *Hoysradt v. Holland*, 50 N. H. 433. But see *Duncan v. Blair*, 5 Denio 196; *Machir v. McDowell*, 4 Bibb 473; *Howe v. Walker*, 4 Gray 318; *Sage v. Jones*, 47 Ind. 122; and taxes, *Brckett v. Evans*, 1 Cush. 79; *Headrick v. Wisheart*, 57 Ind. 129, 41 Ind. 87, 48 Ind. 144; *Preble v. Baldwin*, 6 Cush. 549; *Landman v. Ingram*, 49 Mo. 212; *Hersey v. Verrill*, 39 Me. 271; *Shields v. Harrison*, 77 N. C. 115; *McLennan v. Cheguin*, 37 U. C. Q. B. 301; aliter as to subsequent rents or taxes, *Smart v. Harding*, 29 Eng. L. & Eq. 252; *Walker v. McDonald*, 5 Minn. 455. See *Hand v. Liles*, 56 Ala. 143; and municipal assessments, *McCormick v. Cheevers*, 124 Mass. 262; *Swindell v. Richey*, 41 Ind. 281; *Carr v. Dooley*, 119 Mass. 294; and judgments, *Besshears v. Rowe*, 46 Mo. 501; and pay for fixtures, *Heysham v. Dettre*, 89 Pa. St. 506; *Hensley v. Brodie*, 16 Ark. 511; *Bostwick v. Leach*, 3 Day 476; *Mott v. Palmer*, 1 N. Y. 564. See *Noble v. Bosworth*, 19 Pick. 314; *West v. Blake*, 2 Mann. & Gr. 729; and a subsisting lease, *Allen v. Lee*, 1 Ind.

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in grain—wheat and rye; that the complainant said the tenant had no right to sow except on the ground on which he had sowed the wheat, and the defendant, in view of the fact that so much of the farm was sown, said that he would have nothing to till; that the complainant said he would guarantee to the defendant half of the ground on which the rye was, and the defendant replied that if he would do that and put it in writing, he would make the exchange, which the complainant agreed to do. The defendant got the agreement drawn, and had it so drawn as to secure to him the whole of the rye, which was not in accordance with the bargain; but he gives as his reason for having it so drawn that he intended to endeavor to induce the complainant to agree, for a further consideration, to secure to him the whole of the rye. The complainant, however, refused to sign the instrument as drawn in that respect, and himself corrected it so as to conform to the agreement. The deed contains no reservation whatever. The reason why a reservation was not inserted seems to have been that the scrivener by whom the deed was drawn

58; *Bomrey v. Morrill*, 57 Me. 368; and that vendee was to use a certain amount of coal annually from the land, *Graver v. Scott*, 80 Pa. St. 88.

A parol exception of a barn from lands conveyed by deed, is void, *Detroit R. R. v. Forbes*, 30 Mich. 165; *Laudon v. Platt*, 34 Conn. 517; *Whitaker v. Cawthorne*, 3 Dev. 389; or, of a gin-house, *Bond v. Coke*, 71 N. C. 97; or, of a saw-mill, *Pea v. Pea*, 35 Ind. 387; or, of a house, *Gibbs v. Estey*, 15 Gray 587; *Duff v. Snider*, 54 Miss. 245. But see *Dame v. Dams*, 38 N. H. 429. Or, of manure, *Counce v. Foster*, 9 N. H. 538; *Goodrich v. Jones*, 2 Hill 142; *Conner v. Coffin*, 22 N. H. 538; *Proctor v. Gilson*, 49 N. H. 62. See *Ruckman v. Outwater*, 4 Dutch. 581. Or, of timber, *Safford v. Annis*, 7 Me. 168; *Warren v. Le-land*, 2 Barb. 613. But see *Carpenter v. Otley*, 2 Lans. 451; *Stickney v. Parmenter*, 35 Mich. 237; *Cockrill v. Downey*, 4 Kan. 426; *Jones v. Timmons*, 21 Ohio St. 596. Or, of a partition wall, *Wickersham v. Orr*, 9 Iowa 253; *Rice v. Roberts*, 24 Wis. 461; or, of unaccrued rents, *Winn v. Murehead*, 52 Iowa 64; or, to obtain vendor's wife to release her dower, *Martin v. Wharton*, 38 Ala. 637; or, the use of a spring on the premises sold, *Vermont R. R. Co. v. Hills*, 23 Vt. 681; or, of a license, *Voorhees v. Burchard*, 6 Lans. 176, 55 N. Y. 38; *Jungerman v. Boree*, 19 Cal. 354; *McKee v. St. Louis*, 17 Mo. 184; *Kent v. Kent*, 18 Pick. 569.

A parol agreement as to the possession of lands conveyed by deed, is good, *Hersey v. Verrill*, 39 Me. 271; *Quimby v. Stebbins*, 55 N. H. 420; *Merrill v. Blodgett*, 34 Vt. 480; *Parsons v. Camp*, 11 Conn. 525; *Willis v. Hurlbert*, 117 Mass. 151; *Miranville v. Silverthorne*, 1 Grant's Cas. 410. CONTRA, *Gilbert v.*

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thought it was unnecessary, because, as he told the complainant, the agreement would protect him in that respect. After the exchange had been made, the defendant told both William W. Conover and Henry D. Hendrickson that it had been made, and that the complainant had reserved the wheat and half the rye, and Mr. Conover swears that, subsequently to the conversation with him, the defendant told him that he had got a warranty deed, and could hold the rye and all the grain, and was going to do so. William W. Conover swears that the defendant told him that the complainant reserved the grain, but had not put the reservation in the deed; and he testifies that the defendant further said that he thought he could hold the grain, because the deed contained no reservation. The fact that the stipulation was made in the written agreement to secure to the defendant half of the rye, is not only evidence that the latter knew that the crops belonged to the tenant, but raises a strong inference that he was not to have any of the wheat. The weight of the evidence clearly is that he so understood it, and that, finding that under the

Bulkley, 5 Conn. 262; *Gough v. Dorsey*, 27 Wis. 119; *Melton v. Watkins*, 24 Ala. 433; *Drake v. Root*, 2 Colorado 685; *Loomis v. Loomis*, 60 Barb. 22; *Jones v. Timmons*, 21 Ohio St. 596; *Howard v. Easton*, 7 Johns. 205. But not as to the right of rescission or re-purchase, *McEwan v. Ortman*, 34 Mich. 325; *Graves v. Graves*, 45 N. H. 323; *Sennett v. Johnson*, 9 Pa. St. 335; *Pattison v. Horn*, 1 Grant's Cas. 301; *Peacock v. Nelson*, 50 Mo. 256; *Beers v. Beers*, 22 Mich. 42; *Burrell v. Root*, 40 N. Y. 496; *Wemple v. Knopf*, 15 Minn. 440; *Ahrend v. Odiorne*, 118 Mass. 261; *Bonham v. Craig*, 80 N. C. 224; *Ballard v. Bond*, 32 Vt. 355; *Campbell v. Campbell*, 2 Jones Eq. 364; *Gallagher v. Mars*, 50 Cal. 23. But see *Greenawalt v. Kohne*, 85 Pa. St. 369; *Boyd v. Stone*, 11 Mass. 342; *Arrington v. Porter*, 47 Ala. 714; *Davis v. Inscot*, 84 N. C. 396; *Lee v. Lee*, 11 Rich. Eq. 574; and an agreement not to carry on the same business as had been carried on in the premises sold, *Pierce v. Woodward*, 6 Pick. 206; *Leinaw v. Smart*, 11 Humph. 309; *Fusting v. Sullivan*, 41 Md. 162; *Warfield v. Booth*, 33 Md. 63; *Bostwick v. Leach*, 3 Day 476; *Gottschalk v. Witter*, 25 Ohio St. 76; *Whitaker v. Welsh*, 2 Pug. 436; *Perkins v. Clay*, 54 N. H. 518; and a contract to repair, *Manning v. Jones*, Busb. 368; *Buzzell v. Williard*, 44 Vt. 44. See *Buttemere v. Hayes*, 5 M. & W. 456; *Nicoll v. Burke*, 78 N. Y. 580; *Cleves v. Willoughby*, 7 Hill 83.

That a parol reservation of crops from a written contract of sale or deed for the lands whereon the crops are growing, is void, see *Vanderkarr v. Thompson*, 19 Mich. 82; *Bloom v. Welsh*, 3 Dutch. 179; *Brown v. Thurston*, 56 Me. 126; *Smith v. Price*, 39 Ill. 28; *McIlwaine v. Harris*, 20 Mo. 457; *Harbold v.*

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covenants in the deed he could hold the complainant liable at law for the wheat crop, he determined to avail himself of the covenants accordingly. The complainant is entitled to the relief which he seeks.

In *Hendrickson v. Ivins*, Saxt. 562, such relief was granted under similar circumstances. The defendant's claim that the complainant has forfeited his right, if any he had, to the aid of this court in the premises, by his delay in invoking it, cannot avail him. He has lost nothing by that delay. He has, indeed, been involved in expensive litigation, which would not have taken place had the complainant come here for relief at an earlier day; but the litigation was the result of the defendant's disregard of the agreement, and his determination to take advantage of the failure of the instrument to express the whole agreement between him and the complainant, and inequitably to avail himself of the covenants in the deed; which covenants, it may be added, the complainant was not bound to give. The injunction will be made perpetual, with costs.

Kuster, 44 Pa. St. 392; *Backenstoss v. Stahler*, 33 Pa. St. 251; *Wintermute v. Light*, 46 Barb. 278; *Burnside v. Wightman*, 9 Watts 46; *Johnson v. Taullinger*, 31 Iowa 500; *Turner v. Cool*, 23 Ind. 56; *Wood v. Lang*, 5 U. C. C. P. 204. CONTRA, *Merrill v. Blodgett*, 34 Vt. 480; *Flynt v. Conrad*, Phil. (N. C.) 190; *Powell v. Rich*, 41 Ill. 466; *Harvey v. Million*, 67 Ind. 90; *Baker v. Jordan*, 3 Ohio St. 438; *O'Dell v. Coyne*, 4 U. C. C. P. 452. See *Benner v. Bragg*, 68 Ind. 338; *Robinson v. Pitzer*, 3 W. Va. 335; *Noble v. Smith*, 2 Johns. 52.

A defendant in execution cannot, by parol, authorize a levy on growing trees or grass, *Bank of Lansingburgh v. Crary*, 1 Barb. 542. See *McKenzie v. Lampley*, 31 Ala. 526; *Osborn v. Rabe*, 67 Ill. 108; *Cudworth v. Scott*, 41 N. H. 456; *Adams v. Smith*, *Breeze* 283; *Haydon v. Crawford*, 3 U. C. Q. B. (O. S.) 583.

Where growing grain has been reserved, from a deed of the lands, a subsequent purchaser of the crop, with notice of the reservation, is bound thereby, although the reservation was by parol, *Burnside v. Weightman*, 2 Watts & Serg. 268; *Harlan v. Harlan*, 20 Pa. St. 303; *Moats v. Witmer*, 3 Gill & Johns. 113; *East v. Ealer*, 24 La. Ann. 129; *Davis v. Brocklebank*, 9 N. H. 73; *Dame v. Dame*, 38 N. H. 429. But see *Goff v. O'Conner*, 16 Ill. 421; *Byasse v. Reese*, 4 Met. (Ky.) 374; *Westcott v. Delano*, 20 Wis. 514; *Sanders v. Ellington*, 77 N. C. 255; *Milliman v. Neher*, 20 Barb. 37; *Seatoff v. Anderson*, 28 Wis. 212.

Equity may grant relief to the owner of the crops, *Lauchner v. Rex*, 20 Pa. St. 464; *Barnes v. Shinholster*, 14 Ga. 131; *McGuiness v. Kennedy*, 29 U. C. Q. B. 33. But see *Young v. Miller*, 10 Ohio 85.—REP.

Vreeland v. Torrey.

GEORGE VREELAND

v.

SAMUEL W. TORREY.

1. If the validity of a release of an assumption of a mortgage (when a decree for deficiency is sought) is questioned, the complainant must frame the issue so as to raise the question.

2. Lands covered by a mortgage were, in part, afterwards laid out by the mortgagor as a public street, and accepted and treated as such by the municipal authorities. Subsequently the mortgagee released that part of the mortgaged premises adjoining the street, and described it as bounding on the street.—*Held*, that the land lying in the street is, as against the mortgagee, subject to the public rights acquired by the dedication and release.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. R. I. Hopper, for complainant.

Mr. T. M. Moore, for John H. Cheever and the Aquackanonk Water Co.

THE CHANCELLOR.

The questions presented for decision are, whether the defendant John H. Cheever is liable to complainant for deficiency, and whether a street called Monroe street, laid out by the defendant Torrey on the mortgaged premises, should not be excepted from the operation of the complainant's mortgage.

The liability of Cheever for deficiency is based on the fact that Torrey, in 1875, conveyed to him part of the mortgaged premises, subject to certain mortgages, among which was the complainant's, the payment of one-half of some of which mortgages, including that of the complainant, he assumed. It appears, however, that at that time Torrey was largely indebted to Cheever for money lent, and in September, 1875, the former

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gave his mortgage to the latter for \$35,000, on his undivided half of the property, accordingly. That indebtedness was increased by advances made by Cheever for Torrey, so that in February, 1881, it amounted to \$51,749.46. In August, 1878, before the filing of the bill, Torrey gave to Cheever a release, under seal, of his liability under the assumption. The release states that it was made for the consideration of \$5,000 paid by Cheever to Torrey, and the answer of Cheever says the same thing, but it is insisted by the complainant that there was in fact no consideration. Cheever alleges that the indebtedness of Torrey to him exceeds the amount of his assumption, and he claims allowance for it by way of equitable setoff, in case the release should be held insufficient for his protection. The release, however, is not attacked in the bill; indeed, it is not mentioned. If the complainant desired to deny its validity so far as his rights are concerned, he should have so framed the issue as to raise the question (*Young v. Trustees*, 4 Stew. Eq. 290, 302), but he has not done so. There will, therefore, be no decree for deficiency against Cheever.

As to the other question: Torrey, in 1876, sold and conveyed to the Dundee Water Power and Land Company part of the premises described in the complainant's mortgage, bounding it on Monroe and Canal streets. Those streets were laid out and opened over the property by Torrey in 1871, and in 1872 the board of chosen freeholders of the county built a bridge over a brook which the street crossed, and which is one of the boundaries of the released premises. The village of Passaic, a municipal corporation within the bounds of which the premises are, on its map of streets (since adopted by its municipal successor, the city of Passaic), laid down the streets as dedicated by Torrey, thus recognizing them as public streets. The mortgagee of the complainant's mortgage, on the 31st of May, 1876, released the property by like description, bounding it on the streets, from the lien and encumbrance of the mortgage. The Dundee Water Power and Land Company, in the same month of May, demised the premises so released, to the Aquackanonk Water Company for a term of twenty-one years, with privilege of renewal. The latter company, after the demise was

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made, erected its pump-house on the property, and from there laid its conduit pipes in Monroe street to supply the city of Passaic with water. The mortgagee, by bounding the property in the release on the street, confirmed the dedication of the land in the *situs* of the street to the purposes of the street. *Clark v. City of Elizabeth*, 11 Vr. 172; *Hague v. West Hoboken*, 8 C. E. Gr. 354. The bill challenges the claim of the water company to a right to keep its pipes in the street superior to the complainant's mortgage, and the water company joined issue with him thereon. The right is established, and, as a consequence, the land in the *situs* of Monroe and Canal streets must be sold, subject to the dedication thereof to use as public streets and the rights flowing therefrom.

WILLIAM W. SHIPPEN et al.

v.

MIFFLIN PAUL et al.

From a deed of lands conveyed by the defendant to complainants, a strip was excepted "for a public road or turnpike and for no other use," and was so described in a map of the premises filed in the county clerk's office at that time. A turnpike road was built on it. The defendants afterward encroached on the strip by erecting buildings &c. thereon. On bill for an injunction to prevent the turnpike company from removing such encroachments—*Held*, that it constituted no ground for relief that there were informalities in the organization of the turnpike company, nor that the turnpike company had not, by legislative grant, obtained the public easement over the strip—the turnpike having been built and large sums of money spent thereon with complainants' knowledge and acquiescence; nor that the taking of tolls thereon was suspended when the encroachments were made, such suspension being merely temporary on account of the destruction of a bridge at the terminus of the turnpike.

Bill for injunction. On final hearing on pleadings and proofs.

Shippen v. Paul.

Mr. C. Haight, for complainants.

Mr. J. S. Applegate, for defendants.

THE CHANCELLOR.

This suit is for a perpetual injunction to restrain the defendants, officers of the Highlands and Seabright Turnpike Company, from entering on the complainants' land at Seabright, and pulling down and removing fences, barns and out-houses &c. thereon. The land in question, and which it is the object of this suit to protect against the defendants' claim to dominion over it, is a strip of land about twenty-eight feet wide, in the rear of the lots of the complainants, on the ocean front, on which their seaside cottages are built. The bill states that the tract (of about seventy acres) of which the premises in question are part, was bought by Messrs. Shippen and Dod, two of the complainants, through the defendant Paul, as their agent; that they paid all the purchase-money; that the deed was made to Paul and he executed and delivered to them a declaration of trust; that subsequently he obtained from them an interest, one-third, in the property, and that afterwards he and they made a division of the property among them by "deeds of quit-claim, release or partition;" that in those deeds a strip of sixty-six feet in width, of which the land in question is part, was reserved for a road or turnpike; that the turnpike company was incorporated in 1875, and, after a pretended organization had been made, proceeded to construct a turnpike, to the construction of which the complainant Shippen and others contributed about \$2,300; that soon after the road was built the whole project of maintaining a turnpike road was abandoned, and the complainants, acting upon the fact of such total abandonment, laid out large sums upon the public highway on part of the sixty-six-foot strip in the rear of their respective properties, and built barns, fences &c. on other parts of it immediately adjoining their lots; that the turnpike company never acquired the right to the sixty-six-foot strip, or any part of it, or to any use of it in any way; that the project having been abandoned for three years, Paul, in April, 1879,

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sought to effect a new organization of the company solely in his own interest and for his own benefit, and to enable him to defraud the complainants; that such organization was illegal, because the charter was forfeited by failure to obtain the required subscriptions to stock within the time limited for the purpose in the act, and that in pursuance of Paul's design unjustly to compel the complainants to pay him a large sum of money, notice was given by the secretary of the company, on the 16th of April, 1879, to the complainants, that they had encroached on the turnpike, and must remove the encroachments at once, and Paul, claiming to act as superintendent of the company, threatens to move the barns, fences &c. which the complainants have erected on the sixty-six-foot strip.

This case was before the court on a motion to dissolve on bill and answer. The motion was denied, because the turnpike company showed no right to the land in question, and it seemed best to retain the injunction until the final hearing. *Shippen v. Paul*, 4 *Stew. Eq.* 439. Now that the evidence is in, it appears, according to the weight of evidence, that the property (the seventy acres) was bought, not as stated in the bill, by Paul for himself and Shippen and Dod, but by him on his own account, and was conveyed to him accordingly by deed dated June 25th, 1869; that on his purchase of it, and before the deed was delivered, he gave to the vendor, Dr. Conover, for \$900 of the purchase-money, a railroad bond of \$1000 belonging to him, which he was to have the right to redeem by paying the \$900; and when the deed was delivered he gave a mortgage for the rest of the purchase-money. He subsequently let Messrs. Shippen and Dod into equal ownership of the property with him, and he and they made up in equal shares in cash the amount of the whole of the purchase-money, less a discount of \$190 allowed to him by Dr. Conover on the part of it secured by mortgage. Of this money, Messrs. Shippen and Dod paid to Paul each \$300 on the 1st of July, 1869, and with that money and \$300 of his own, he redeemed the railroad bond. They paid the rest of their shares of the money to him (each paying \$1,423.33 $\frac{1}{3}$) on the 17th of the same month; and he, con-

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tributing a like amount, took up the mortgage. The consideration of the deed to him is \$5,360. The moneys paid amounted, altogether, to \$5,170. The rest is the discount, \$190, before mentioned, allowed on the money secured by mortgage. Mr. Paul, it may be remarked, is corroborated in his statement that he gave a bond and mortgage for part of the purchase-money by Mr. Corlies, who drew those papers; and no attempt is made to contradict his statement that he gave the railroad bond on account of the purchase-money, as before mentioned. When Paul let Shippen and Dod in, he executed a declaration of trust declaring his and their respective interests in the property. Afterwards, and in January, 1872, he conveyed to them respectively, for their respective shares, certain lots, pursuant to an agreement of partition made by him and them. In the deeds to them, he excepted and reserved out of the lands conveyed to them, a strip of land belonging to the railroad company, and a strip sixty-six feet wide, as laid down on a map which he had caused to be made of the property, and which is filed in the Monmouth county clerk's office, along the east and west sides of and adjoining the railroad company's land (part of it is on the east and part on the west side of the railroad company's land); declaring that that strip shall be "for a public road or turnpike, and for no other use." The turnpike company was incorporated in 1875. (*P. L. of 1875, p. 191.*) It was authorized to construct a turnpike road from the Highlands station, on the Long Branch and Sea Shore railroad, to Seabright station, beginning one hundred feet south of the easterly abutment of the Navesink bridge, at the Highlands, and ending at the easterly abutment of the bridge across the Shrewsbury river at Seabright. The act provides that the turnpike road shall be at least twenty-five feet in breadth along the middle, as nearly as may be, of the highway. It also provides that the capital stock of the company shall be \$10,000, with liberty to increase it to \$15,000, to be divided into shares of \$25 each; and that when eighty shares shall be subscribed for (\$2 a share to be paid in on subscribing, and the rest in installments, at the call of the president and directors of the company), the persons holding them shall be a corporation

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by the name of the Highlands and Seabright Turnpike Company. The act provides that twenty days' notice of opening the books shall be published in at least two newspapers published in this state. By the fourth section it is provided that if the eighty shares should not be subscribed for in three years from the opening of the books, the act and all the subscriptions should be null and void. The next section provides that when the eighty shares shall have been subscribed, a meeting of the stockholders for organization shall be called on twenty days' like notice. The first notice for subscriptions to the stock was given in 1875. It was published in only one newspaper, instead of two, as the charter directed. Mr. Corlies testifies that on the day fixed in the notice for the meeting, not less than forty shares were subscribed, and the whole of the requisite eighty were obtained in the course of the next three or four days. The subscriptions appear to have amounted to \$2,150. An organization was then made, and a contract for constructing the turnpike was subsequently (May 1st, 1875), and after bids from him and others had been received and considered, entered into by the company with Mr. Paul. By it he was required to finish the road in two months, which time would expire on the 30th of June, 1875. He finished it within the time, and the work was accepted. He was to receive as his compensation, \$7,500, of which \$1,500 were to be paid in stock of the company; \$1,000 in bonds of the Navesink Bridge Company, or of the turnpike company, at the option of the latter; and \$5,500 in cash, in installments of \$2,000, on or before May 28th, 1875; \$2,000 on or before June 28th, 1875; and \$1,500 at the completion of the work. He appears to have received the stock and bonds, and some money, but he and the company claim that there remain due to him \$4,466.11, besides interest. About the time the work was completed, the draw of the Navesink bridge, at the Highlands, was broken by the collision of a schooner with it, and it was not repaired for three or four years. By reason of the impassable condition of that bridge, the turnpike was rendered useless except for travel on the east side of the river, and no attempt was made to take tolls upon it until after the bridge was repaired, which was in

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1878. In that year, after the bridge had been repaired, the company resolved to repair the road and take toll, and appointed Paul to make the repairs and take the tolls. He set up a toll-house and gate, and took toll for a few days, but the attempt to take tolls met with violent opposition on the part of the complainants and others, and he moved the toll-house and gate away. The opposition not only denied the right of the company to take tolls, but denied that the company had a legal existence, because notice of opening the books of subscription to the stock in 1875 was published in only one newspaper, instead of two, as directed by the charter. To remedy the defect, if it existed, the company afterwards, in 1879, again gave notice of opening the books (this time in two newspapers), and took subscriptions to the stock. Eighty shares having been subscribed, a new organization was made in November of that year, and the company proceeded to repair the turnpike and to remove encroachments. Out of its action with respect to the latter, this litigation arose.

The legality of the organization of the company cannot be called in question, in this proceeding. The company was, in fact, organized under its charter, in 1875. It took subscriptions to its stock in that year, though it never issued any scrip or certificates therefor, but merely gave receipts. The construction of the turnpike was the object for which it was created. It therefore, in building the road, was not acting *ultra vires*. Its occupation of the *situs* of the land reserved for a public road or turnpike, in the conveyances by Paul to Shippen and Dod, is proved to have been with the consent of Paul, who held the legal title to it (though, as to two undivided thirds, he held it for Shippen and Dod), and without objection on the part of Messrs. Shippen and Dod, and with their implied consent, though it, in fact, never received any grant nor any written evidence of the right to occupy the land. Both Shippen and Dod contributed funds to the construction of the turnpike on that land, and they are to be regarded as having stood by and seen a very considerable expenditure (said to be \$7,000) made in the construction of the road. If the complainants are entitled to an injunction, it must be on the ground that they are entitled to protection absolutely in their occupation

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of the land in question. That they are not so, is clear. The land had, when they began their occupation of it, been, as before stated, dedicated to public use as a road or turnpike; and, by the construction of the turnpike upon it, it was merely applied to the use to which it was dedicated. The legislature, indeed, had not given the company the right which the public had to the right of way or easement over it, but to the use of the road as a turnpike by the company, Messrs. Shippen, Dod and Paul had all fully assented, and the work had been done upon it accordingly. Though no tolls were taken for about three years, it appears to have been for what appeared to the company a sufficient reason—the fact that the Navesink bridge was impassable, and therefore the travel was insignificant. That fact, however, did not prohibit the taking of tolls. By its refraining from taking tolls during that period, the company did not lose the right to do so. Nor did it, by its failure to keep the road in good condition during that time, forfeit its rights. Nor is it estopped, by acquiescence, from taking steps to remove the encroachments. The public right which it asserts has not been lost by the acquiescence of the company. The right of the public, acquired by the dedication, cannot thus be forfeited or lost. The complainants stand before the court without legal or equitable right or claim to the relief which they seek, and the bill must therefore be dismissed. The decree will be with costs.

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FREDERICK BROWN

v.

NATHAN D. PANCOAST et al.

A testator appointed two executors, and named two others to act in case of the death or declination of the former, with authority in the survivor to nominate a co-executor with full power to exercise the same discretion in the management and disposition of the estate as the original appointees possessed. He gave to his two sisters, for their joint lives and that of the survivor, as a residence, his real estate in M., called "the Cottage," with the appurtenances, lands &c., with a gift over to his executors as trustees, to sell the premises and to invest the proceeds and apply the income to purchasing books and founding a useful public library in or near M.

The executors have all died without nominating any associates, testator's sisters are both dead, and a legal organization in M. has established a public library.

On application of the heir at common law of the last surviving executor—*Held*, that he would be directed to sell the premises in M., including a wharf two hundred yards distant from "the Cottage," but bought solely for the use of, and always used by the testator solely in connection therewith, and to pay over the proceeds to the library already existing at M., as trustee; and, further, that the executor's failure to designate a co-executor would not destroy the charity.

Bill for construction of will and directions. On final hearing on pleadings and proofs.

Mr. F. B. Levis and *Mr. B. Gummere*, for complainant.

Mr. D. J. Pancoast and *Mr. J. Wilson*, for the heirs of Nathan Dunn.

Mr. C. E. Merritt, for the Burlington County Lyceum.

THE CHANCELLOR.

Nathan Dunn, late of Philadelphia, deceased, died in 1844. By his will, made in 1840, he provided as follows :

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"I nominate and appoint Frederick Brown and William B. Langdon executors of this my last will and testament. If either of these persons should die, remove or resign his executorship, then I nominate Richard Price, of the city of Philadelphia, an executor in his place; and if both of these persons should die before me, or cease, as aforesaid, to be my executors, then I nominate Lewis Waln, of the city of Philadelphia, an executor, together with the said Richard Price. If only one of the said four persons should be living at the time of my death, and no provision be made by myself for another executor, then I authorize such one of the above-named four persons to name a co-executor; and whenever, at any time, one of my executors for the time being shall die, renounce or resign, and his place shall not be supplied by the above provisions, designating one of the four persons named, then I authorize and desire the surviving or remaining executor to nominate and appoint a co-executor, and so often as such vacancy may occur. I hereby give to such person and persons so to be appointed an executor or executors all the power and authority conferred by the nominations made by myself."

By a codicil made in 1841, he substituted Charles Roberts for William B. Langdon, and by another one, made in the same year, substituted Isaac Collins for Roberts. By the will, he gave to his two sisters, Phebe and Rhoda Osborn, for their joint lives and the life of the survivor of them, the free possession and use of his real estate in Mount Holly, in this state, called "the Cottage," as a place of residence, together with the appurtenances, lands, improvements, fixtures and furniture, and then proceeded as follows:

"When the same shall be vacated by the death of the survivor of them, or by the voluntary relinquishment thereof by the survivor, or both of them, I devise the said real estate and every part thereof, with the appurtenances, lands, improvements, fixtures and furniture therein and thereunto to me belonging (excepting, always, such parts of the furniture and other articles of personal property as may be designated by the said Phebe Osborn and Rhoda Osborn as belonging to them, which they, or the survivor of them, shall receive), to my said executors or trustees, their heirs, executors, administrators or assigns, in trust, to dispose thereof at public auction, after fully advertising the same, and to make good and sufficient title or titles to the purchaser or purchasers in fee simple or otherwise. In making such sale, the said executors (as trustees) are hereby authorized and empowered to divide the property and sell and convey portions or parts of the land in lots or parcels, or to dispose of and convey the whole together, as to them may appear most eligible. I give and bequeath \$2,000 of the proceeds of such sale or sales to the said Phebe Osborn and Rhoda Osborn and the survivor of them, on the event of their or her vacating the premises during their joint lives, or

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the life of the survivor; and I give and bequeath the rest and residue of the proceeds of such sale or sales to my executors in trust, to invest the same in good securities, and to apply the interest and income of such investments, from time to time, in the purchase of books and in forming a useful library, to be opened in some appropriate and well-situated institution in or near Mount Holly, to be kept open during such hours and times as may be most convenient and useful for the persons for whose use it is designated. It is my will that the said library may be devoted to the use of persons residing in and about Mount Holly, generally, and more particularly to the use and benefit of young men and apprentices. I authorize my said executors to adopt and carry into full effect such plan of organization and arrangement as may give the most efficacy to this project, comprehending, if they think proper, a lyceum. If they should appoint a board of trustees, I desire that such board may be composed of persons who reside in or near Mount Holly, and that such arrangement may carefully be made as will best appropriate the funds and preserve and perpetuate the uses of them herein expressed or contemplated."

Of the executors appointed by the will, only Mr. Collins and Mr. Brown accepted the trust. The former died January 15th, 1863, and the latter, February 27th, 1864. Waln died December 20th, 1863, and Price July 8th, 1865. No appointment to fill any vacancy in the executorship was ever made. Phebe and Rhoda Osborn occupied the property given to them by the above-mentioned provision of the will, together, after the testator's death until the death of Phebe, which occurred in 1855, and Rhoda occupied it from that time until her death, which took place in May, 1880. The cottage stands on a tract of about twenty-five acres. The testator owned a wharf-lot distant about two hundred yards from it, which he bought for use in connection with it as a place on which to land lime, marl &c. The bill is filed by the eldest son and heir at common law of Frederick Brown, who survived his co-executor, Collins, to establish his claim as such heir to the title to the property, subject to the trust, and his right to sell it and administer the trust out of the proceeds of the sale, and for direction to administer it through the agency or instrumentality of the Burlington County Lyceum of History and Natural Science, which is an incorporated literary institution in Mount Holly, and is by its charter authorized to maintain and does maintain a circulating library. The bill is filed against the heirs-at-law and next of

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kin of the testator, and the corporation just mentioned is also made a party.

That the purpose to which the testator devotes the proceeds of the sale of the property is a charitable use is entirely clear. He gives them to his executors, in trust, to invest them in good securities and apply the interest and income of the investment from time to time in the purchase of books and in forming a useful library, to be opened in some appropriate and well-situated institution in or near Mount Holly, to be kept open during such hours and times as may be most convenient and useful for the persons for whose use it is designated, and he adds that it is his will that the library may be devoted to the use of persons residing in and about Mount Holly generally, and more particularly to the use and benefit of young men and apprentices. This is a gift for the advancement of useful learning, and such gifts are said to be the most meritorious that can be bestowed, because they afford the means of educating great natural abilities which may be employed for the benefit of the whole community. *Shelford on Mortmain* 68. It is within Mr. Justice Gray's definition of charity, in a technical sense :

"A gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education and religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting and maintaining public buildings or works, or otherwise lessening the burdens of government."

Such gifts as this have been expressly held to be legal charities. *Mason's Exr. v. Meth. Epis. Ch.*, 12 C. E. Gr. 47 ; *Goodell v. Union Association*, 2 Stew. Eq. 32 ; *De Cump v. Dobbins*, Id. 36 ; *Drury v. Natick*, 10 Allen 169 ; *Fairbanks v. Lamson*, 99 Mass. 533 ; *Pickering v. Shotwell*, 10 Pa. St. 23. But it is insisted on the part of the heirs of the testator that the gift is void, because discretion is to be exercised in the selection of the books to be purchased and the place where the library is to be kept, and that discretion was lodged by the testator in the executors named by him and their appointees, and, since those he

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designated are all dead and appointed no one to succeed them, the trust has therefore failed. But the gift here is to a designated charity, one which the court can execute; and in such case the trust will be upheld. *Moggridge v. Thackwell*, 7 Ves. 36; *Mills v. Farmer*, 1 Meriv. 55, 100.

"Where," says Lord Eldon, in the latter case, "the testator has sufficiently denoted that charity is his legatee, the court will consider charity as the whole substance of the legacy, and in such cases only, will provide a mode by which that legatee shall take, but by which no other than charitable legatees can take."

The testator himself, it may be observed, did not rely upon the discretion of his own appointees to administer the trust. He gives the executors power to deliver over the administration to others, strangers; for he authorizes them to appoint a board of trustees to administer the charity, simply expressing his desire that the board be composed of persons residing in or near Mount Holly, and that such arrangements be made as will secure the best appropriation of the funds and preserve and perpetuate the uses for which the charity was designed. Says Mr. Perry in his work on Trusts:

"If a donor makes a gift in trust for a particular charitable purpose, as to establish a particular school, hospital, asylum or other charitable institution, and appoints no trustee, or the trustee appointed by him is incapable of taking the gift and of acting in that behalf; or if the trustee dies before the testator or declines to act; or if trustees are named or appointed who are not *in esse*, but are to come into existence thereafter, as by an act of incorporation, courts of equity, in the exercise of their ordinary jurisdiction, can establish the charity; for it is their invariable practice not to allow a legal and valid charity to fail for want of a trustee. Therefore courts will appoint trustees in such cases to take up and carry out the clear purposes of the donor, and they will order the heir or legal representatives to hold the fund upon the declared trust until trustees can be appointed to execute the trust as contemplated." *Perry on Trusts* § 722.

The fact that the executors who proved the will did not appoint will not defeat the trust, but the court itself will appoint. In *Foley v. Wontner*, 2 J. & W. 245, by a trust deed (of a meet-

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ing-house), power to fill vacancies occurring among the trustees and committees, to whom the control and regulation of the affairs of a congregation were committed (there were to be five committees and thirteen trustees), was given to the surviving trustees and committees, and from time to time, on the appointment of new trustees, proper assignments were to be made; the lord chancellor (Eldon) said :

"In such a case, unless it differs from all other trusts, the court would fill up the number, referring it to the master to appoint proper persons, and when appointed would direct them to carry on the trusts of the deed. Having neglected to fill up the vacancies, there is no one now who has any power. I apprehend neither the congregation nor any one else can fill them up; it must be done by the court."

In *Attorney-General v. Floyer*, 2 Vern. 748, the will appointed six trustees, and provided that when reduced to three they should choose others. All having died but one, the vacancies not having been filled, he filled them. It was held that the provision that the trustees, when reduced to three, should fill the vacancies, was directory merely, and that the single surviving trustee had a better right than any one else to fill the vacancies, and that it was his duty to do so, and he might well convey to other trustees appointed by him. In *Attorney-General v. Bishop of Litchfield*, 5 Ves. 825, the will directed that the three last survivors of eight trustees to present to a living thereby appointed should make choice of new trustees to be added to them successively to present. By neglect the number was not filled up at the time of an avoidance. Presentation was made by the heir of the last survivor under his legal title, and the court refused to discountenance the appointment, and said that the court ought to control the appointment of trustees, and that it would, at the hearing, refer it to a master to appoint. See, also, *Tudor on Charitable Trusts* 389. In *In re Morton and Hallett*, 42 L. T. R. (N. S.) 602, a testator devised hereditaments to A and B and their heirs, upon trust that they or the trustees or trustee, for the time being, of the will, should make sale thereof; and he declared that if the trustees by the will appointed, or either of them, or any trustee or trustees

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to be appointed as thereafter provided, should die, go to reside beyond seas, or be desirous of being discharged, or refuse or become incapable to act, then and so often the said trustees or trustee (and for that purpose any retiring trustee should be considered a trustee) might appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying or becoming incapable to act. It was held that the heir of the survivor of A and B could sell, and was not prevented from doing so by the power of appointing new trustees. Wherever circumstances render it necessary or desirable to appoint new trustees, this court, in the exercise of its inherent jurisdiction, will interpose, upon a proper application, and make the appointment; and that, too, whether the instrument creating the trust does or does not contain a power to appoint new trustees. *Hill on Trustees* 190; *Green v. Blackwell*, 4 *Stew. Eq.* 37.

The fee of the land in question, subject to the particular estate, vested in the executors, Frederick Brown and Isaac Collins, as joint tenants, on their proving the will. *Heater v. Van Auken*, 1 *McCart.* 159; *Weehawken Ferry Co. v. Sisson*, 2 *C. E. Gr.* 475; *Graham v. Houghtalin*, 1 *Vr.* 552; *Rev.* 1224. And on the death of the survivor it descended to the complainant as his heir at common law. *Rev.* 1224; *Schenck v. Schenck*, 1 *C. E. Gr.* 174; *Zabriskie v. M. & E. R. R. Co.*, 6 *Stew. Eq.* 22, affirmed on appeal, 7 *Stew. Eq.* 282. Waln was then dead, and Price, though living, would not accept the trust. No title, therefore, vested in him. *Perry on Trusts* § 259.

The Burlington County Lyceum of History and Natural Science was incorporated by a special act of the legislature (*P. L. of 1860 p. 42*), and under a subsequent general law (*P. L. of 1876 p. 262*), has power to establish a circulating library; and, in fact, has now such a library of the value of about \$2,500. It appears to be, in all respects, a proper trustee, and is willing to accept the trust. Under the general law just referred to, it is authorized, for the establishment, maintenance and increase of its library, to accept and receive gifts, grants, bequests and devises of real and personal property, by deed, will or otherwise. This trust is within the general scope of the purposes of the corpora-

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tion, and it may, therefore, take it; and, if it accepts it, it may be compelled to execute it. *Perry on Trusts* § 43; *Mason's Est. v. Trustees &c.*, 12 C. E. Gr. 47.

Part of the land has been converted by condemnation proceedings, and the proceeds are in the hands of the complainant. The rest of the property will be sold. The wharf-lot was purchased merely for use in connection with the other property, and was so used accordingly. The testator lived in Philadelphia. He intended the property for a permanent residence for his sisters, and he lived there himself at times, and contemplated making it his own permanent abode. He had no other land in this state. The wharf-lot, as before stated, is about two hundred yards distant from the main property. It is on the creek. There was no railroad when he bought it, and he bought it for use as a convenience to his property to land marl, lime, ashes &c., which he caused to be brought there for use on the property, and he never used it in any other way than in connection with the property. He evidently considered it a parcel of the property. The devise of the particular estate &c., is of his real estate called "the Cottage," together with the appurtenances, lands, improvements, fixtures and furniture;" and the devise of the remainder is of "the said real estate and every part thereof, the appurtenances, lands, improvements, fixtures and furniture therein and thereunto to me belonging." The testator intended, by the devise of his real estate called "the Cottage," together with the lands &c., to include the lot in question as parcel thereof.

The complainant will be directed to sell if he will (being a non-resident, and therefore beyond the jurisdiction of the court) give security for the performance of his duty in the premises, and pay over the proceeds of the sale, as well as the other money in his hands received from the condemnation, to the Burlington County Lyceum of History and Natural Science, to be administered by it as trustee in his stead.

Kline v. Cutter.

MILLER KLINE

v.

HAMPTON CUTTER.

A mechanics' lien-claim was entitled to priority over a mortgage on the premises, but owing to the carelessness of the county clerk in making up the record, the judgment on the lien-claim was entered as a *general* judgment, and hence the master, on the foreclosure of the mortgage, reported that the mortgage was a prior encumbrance. The mistake was not discovered by the holder of the judgment until after the sale on the foreclosure. The property was bought by the mortgagee.—*Held*, that the priority of the judgment could be established, and that complainant had not forfeited his right to redress through laches, the delay having been caused by his endeavor to obtain his just demand without resort to litigation.

Bill for relief. On final hearing on pleadings and statement of facts agreed upon, and proofs.

Mr. B. A. Vail, for complainant.

Mr. G. R. Lindsay, for defendant.

THE CHANCELLOR.

The complainant's claim for relief rests on the following circumstances: On the 11th of August, 1869, John T. Hewitt was the owner of certain real estate in Rahway. On that day he began to contract a debt with Ayres, Lufbery & Co., for which a lien could be maintained on that property under the mechanics' lien law. On the 23d of that month he gave a mortgage on the property for \$3,000 and interest to Garret Berry, who subsequently assigned it to Hampton Cutter, the defendant in this suit. On the 10th of August, 1870, Ayres, Lufbery & Co. filed a lien-claim for the debt above mentioned, and on the same day issued a summons thereon. On the 31st of the same

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month, a general and special judgment against Hewitt, as builder and owner, was ordered in the suit for \$677, damages and costs, and entered in the minutes of the court accordingly, and on the same day a special and general *feri facias* was issued. On the 15th of April, 1871, Ayres, Lufbery & Co. assigned the judgment to Miller Kline, the complainant. On the 18th of March, 1873, Cutter filed his bill in this court to foreclose his mortgage, making Kline a party defendant thereto on account of a mortgage he held on the premises, but not on account of his judgment, with respect to which Ayres, Lufbery & Co. were made defendants; the complainant's assignment thereof not being then on record. The ticket served on Ayres, Lufbery & Co. stated that they were made parties because they had recovered a judgment against Hewitt; but according to the bill, they had recovered two, the judgment in question and another. The defendant, by his bill in the foreclosure suit, claimed priority over both judgments. Such claim was, however, by a merely formal allegation that his mortgage was entitled to priority over all the other encumbrances. Kline did not answer, and a decree *pro confesso*, with an order of reference, was taken July 22d, 1873. Kline proved before the master the judgment, as entered in the minutes of the court, and the *feri facias*, both of which were special as well as general. The clerk of the circuit court, in making up the record of the judgment, had, however, by mistake (but Kline was not aware of the fact), recorded it as a general judgment only, and the master, therefore, reported that the defendant's mortgage was entitled to priority over it. A final decree was entered accordingly, and on the execution issued thereon the property was sold, on the 16th of September, 1874, to Cutter for \$1,105. Kline did not discover the fact that his judgment had been postponed to the mortgage until he applied to the sheriff for payment, out of the proceeds of the sale of the mortgaged premises, of the amount due him on the judgment. The fact that it was merely through the mistake of the clerk that Cutter's mortgage had obtained priority over Kline's judgment was soon communicated to Cutter, and, in behalf of Kline, he was requested to convey the property to the latter, who

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offered to do all that equity required in the premises. Cutter held the matter under consideration for a long time, and when approached on the subject from time to time promised to give the matter his attention, but did not deny Kline's right to relief. After the sale, Kline applied to this court for relief, by petition in the foreclosure suit, and, on a suggestion from the court made thereupon, made application to the circuit court to correct the judgment. That application was denied, on the ground that equity was the proper forum. On the 16th of January, 1880, the bill in this cause was filed. That the complainant is entitled to relief, unless he has forfeited his claim to it by his laches, is extremely clear. Through a mistake (of which, as before stated, the complainant had no knowledge) made by the clerk of the circuit court in entering the judgment, the master, in the foreclosure suit, reported adversely to the complainant, postponing his judgment to the defendant's mortgage. The complainant, not being aware of the error of the clerk, presumed that due precedence had been accorded to his claim, and rested secure. The defendant thus obtained an advantage over him to which, in equity, he was not entitled, and which he ought not to be permitted to retain. This court will correct the mistake in the complainant's judgment by relieving him, as far as practicable, consistently with equity, from the consequences of it. *Story's Eq. Jur.* § 166; *Loss v. Obry*, 7 C. E. Gr. 52. The defendant's counsel insists, however, that there was a fatal error in the proceedings in the lien-claim which debars the complainant from such relief, and that is the omission of the clerk of the circuit court to endorse on the lien-claim the date of the issuing of the summons. The error is amendable. *James v. Van Horn*, 10 Vr. 353. The defendant will not suffer unjustly if the amendment be made. He took his mortgage subject to the lien-claim. He took it only a few days after the first item of the lien-claim was contracted, and almost a year before the suit on the lien-claim was brought. Nor does the complainant appear to have forfeited his claim to the aid of this court by laches. He seems to have endeavored, for a long time, to obtain relief by an arrangement so as to render suit unnecessary, and only to have come to

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this court when he found that he was unable to obtain relief otherwise. Again, the defendant's situation, with reference to the property, does not appear to have changed since the sale. The complainant's debt will be decreed to be a lien upon the property, and, unless the defendant shall choose to pay it without sale, the property will be sold to pay the defendant, in the first place, the sheriff's execution fees of the foreclosure suit; and, in the next place, to the complainant the amount due to him on his judgment, after applying to those fees and the judgment any money which may be found due from the defendant for rents and profits of the property since the sale (for which the defendant must account); and, in the next place, the amount due the defendant on his mortgage. In view of the fact that it is only from the complainant's want of attention to the record of his judgment that this suit became necessary, no costs of this suit will be awarded to him; but none will be given against him.

JAMES VAN SYCKLE

v.

MANASSAH KLINE et al.

At a partition sale of lands, complainant's mother bought one of the tracts, but, by a previous agreement, bought it for complainant, who paid for it. The sale was confirmed, and deeds ordered to be made to the several purchasers by name. The parties were advised by counsel that the commissioners could not make a deed for the tract to complainant, and hence it was executed to his mother.—*Held*, that, after the mother's death, complainant was entitled to relief, and the fact that his mother paid the taxes on the tract for several years would not estop him.

Bill for relief. On final hearing on pleadings and proofs.

Mr. J. G. Shipman, for complainant.

Mr. J. M. Robeson, for the answering defendants.

Van Syckle v. Kline.

THE CHANCELLOR.

This is a suit by the son of Anna Van Syckle, deceased, of Belvidere, against her other heirs-at-law, to compel them to convey to him a lot of about ten acres, within the corporate limits of that town, which he alleges was held by her in trust for him. The trust set up in the bill is a resulting trust. The complainant states that, after the death of his father, which occurred in 1848, a partition of the land of which the latter died seized, was sought, in the course of which the land was sold (in the spring of 1851) by virtue of a judicial order. The property consisted of a farm, distant about one mile from Belvidere, a wood-lot of about six acres, and the lot in question. At the sale, the wood-lot was struck off to the complainant for \$273.79, and it was conveyed to him by the commissioners accordingly. The rest of the property was struck off to his mother (the farm for \$4,828.30, or thereabouts, and the lot for \$774.40), and was conveyed to her by the commissioners, and she held the title to it up to the time of her death, which took place in July, 1867. The complainant alleges that it was agreed between him and his mother, before the sale, that she should, if she bought the farm, buy the lot in question for him. It appears clearly, by the evidence, that that agreement was made, and that in pursuance of it, she bought the property for him, and that he paid the purchase-money with his own funds, when the deed was taken, and that he and his mother, at that time, requested the commissioners to convey the lot to him, but they declined because, and merely because, the order confirming the sale, by its terms, directed them to convey it to her as the purchaser. It also appears that afterwards, she, from time to time, promised to convey the property to him, and at times, until she became offended with him because he had married against her will, was anxious that he should have a deed for it, but after his marriage, she, in her anger, refused to convey the property to him, up to within a few months of her death, when she exhibited contrition for her conduct in the matter, and again expressed anxiety that he should have the title, and her willingness to make the conveyance to him. It is insisted by the defendants that the complainant, in

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fact, never paid the purchase-money, but the evidence that he did so is overwhelming. Apart from the fact that he swears that he paid it, it appears conclusively, from her admissions proved by other witnesses. Mary Jane Heldemore, her granddaughter, testifies that she (Mrs. Van Syckle) said the lot belonged to the complainant, and that she had never given him a deed for it; that if he had not gone off and got married, she would give him one, but that, in view of his conduct in leaving her and getting married, she would not give him one till she got ready. She says that, after his marriage (which took place in January, 1863), she heard him ask her to give him a deed for the lot, and she said she would not until she got ready, because she said he had abused her by leaving her and getting married, and she said that if he had not married, she would have given him his deed. This witness further testifies that, in the summer of 1864, Mrs. Van Syckle, in conversation with her on the subject, wept, and said she had done wrong in not giving him his deed. She also says that Mrs. Van Syckle told her that the lot was the complainant's, and that he had paid for it. William Miller, a nephew of Mrs. Van Syckle, testifies that, in the fall of 1863, she said at his house, that the complainant's money had paid for the lot, and he ought to have a deed for it, but he should not have it so long as she lived, because he had married. Philip Miller, her brother, says that he frequently heard her say that the lot belonged to the complainant, and that she meant to give him a deed for it. James V. Hay testifies that in the fall of 1863 or 1864 she told him that she had bought the property herself, but that she bought it for the complainant, and he had paid for it. Rebecca Butler swears that she admitted, in her presence, that he had bought the lot and paid for it with his own share, and the witness further says that, subsequently, and in the spring preceding her death, which took place in July, she said to the witness that she thought she was wicked in not giving the complainant a deed for the lot, and added that, when she got well enough, she would go over to Mr. Kennedy (a lawyer of Belvidere) and have a deed drawn for him. And three days before she died, she sent one of her daughters to the complainant

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to tell him to come to Belvidere, where she was then living, and get his deed. That he had the money to pay the price is clear also. The testimony of Dr. Brakely (one of the commissioners) is very strong evidence in favor of the complainant. He says that when the deed for the farm and lot was delivered, there were present, Mrs. Van Syckle and two of her daughters, and the complainant; that the question was asked among the party whether the lot in question could not be conveyed to the complainant, and that he asked Mr. Sherrerd, the lawyer by whom the proceedings in partition had been conducted, whether a deed could be made to the complainant, and Mr. Sherrerd told him that it could not; that the court had ordered the deed made to Mrs. Van Syckle, and the commissioners could not change it, but that she could convey to the complainant, if she thought proper. The testimony of this witness is not affected by the counter-testimony adduced for the purpose.

It was in order to obtain the lot at as low a price as possible, that the complainant (who bought the wood-lot at the sale, bidding for it himself) desired that his mother would buy it for him. He thought there would be less competition against her than against him. It being proved that the lot was purchased for him, and that he paid the purchase-money, he is entitled to the property. He has established a resulting trust in his favor. The fact that the property was taxed to his mother, and that she paid the taxes, is of no weight, under the circumstances. There will be a decree for the complainant; and, inasmuch as the answering defendants appear to have been aware of the complainant's claim and of its merits, before the suit was brought, the decree will be with costs, to be paid by them.

 Smith v. Speer.

FRANK B. SMITH

v.

JACOB SPEER et al.

In 1874, a depositor in a savings bank, Rachel Speer, ordered the following entry to be made in her account: "Frank B. Smith, latter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel; after death, by Frank." In 1870, she directed the following entry to be made in her pass-book in another savings bank: "This account is in trust for Frank B. Smith," and signed it with her name. She kept both pass-books in her own possession, and drew the dividends and part of the deposits down to 1878, when she became insane. Complainant is her nephew, and understood that, although the funds were deposited in trust for him, he was to have no part thereof until Rachel's death.—*Held*, that he had no claim to be protected during Rachel's lifetime, against her or her guardian drawing the funds.

 Bill for relief. On re-hearing.

Mr. S. Kalisch, for complainant.

Mr. W. B. Guild, jun., for defendants.

NOTE.—A gift to an infant may be supported, if accompanied by delivery of the chattel, *Hunter v. Westbrook*, 2 C. & P. 578; *Granigan v. Arden*, 10 Johns. 293; *Snow v. Copley*, 3 La. Ann. 610; *Pierson v. Heisey*, 19 Iowa 114; *Stell v. McKnight*, 1 Bay 64. See *Hudnal v. Wilder*, 4 McCord 294; *Troyell v. Carraway*, 10 Heisk. 104; *Roberts's Appeal*, 85 Pa. St. 84; *Hillebrand v. Brewer*, 6 Tex. 45; *Mahoney v. McCready*, 15 Lower Can. 274. Also, *Jones v. Lock*, L. R. (10 Ch. App.) 25; *Fanning v. Russell*, 94 Ill. 386; *Richardson v. Lowry*, 67 Mo. 411; *Brewer v. Harvy*, 72 N. C. 176; *Carpenter v. Davis*, 72 Ill. 395; *Zimmerman v. Strecker*, 75 Pa. St. 147; *Mason v. Hyde*, 41 Vt. 232. And the law will accept it for the infant, if to its advantage, *De Levillan v. Evans*, 39 Cal. 120; *Darland v. Taylor*, 52 Iowa 503; *Howard v. Copley*, 10 La. Ann. 504; *Goss v. Singleton*, 2 Head 67. See *Barnebe v. Sauer*, 18 La. Ann. 148; *Marston v. Marston*, 21 N. H. 491.

The parent cannot afterwards reclaim it, *Smith v. Smith*, 7 C. & P. 491.

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THE CHANCELLOR.

This cause comes before me on the rehearing of a final decree advised by Vice-Chancellor Dodd. The decree is adverse to the complainant. The bill is filed to protect the claim which the complainant makes as *cestui que trust* to certain moneys deposited by Rachel Speer (formerly Rachel Wharry) in two savings banks: one, the Howard Savings Institution, of Newark, and the other, the Provident Institution for Savings, of Jersey City. In 1860, Mrs. Speer, then Mrs. Wharry, opened the account in the latter institution. She married her present husband in 1862. In 1868 she opened the account in the

Kellogg v. Adams, 51 Wis. 138; *Long v. Long*, 16 Grant's Ch. 239, 17 Id. 251. See *Crany v. Kroger*, 22 Ill. 74; *Taplin v. Wilson*, 4 Hun 244; *Wigle v. Wigle*, 5 Watts 522; *Hunter v. Jones*, 6 Rand. 541; nor his creditors, *Wambold v. Vick*, 50 Wis. 456; *Allen v. Knowlton*, 47 Vt. 512; *Mathea v. Dobschuetz*, 72 Ill. 438. See *Shirley v. Long*, 6 Rand. 764.

Acts of ownership afterwards exercised by a parent over a gift to his minor child, do not invalidate or affect it, *Dodd v. McCraw*, 8 Ark. 83; *Sewall v. Glidden*, 1 Ala. 53; *Ector v. Ector*, 29 Ga. 443; *Whitford v. Horn*, 18 Kan. 455; *Martrick v. Linfield*, 21 Pick. 325; *Hasbrouck v. Bouton*, 41 How. Pr. 208; *Kellogg v. Adams*, 51 Wis. 138; *Fowler v. Lockwood*, 3 Redf. 465; *Piereson v. Heisey*, 19 Iowa 114; *Mortimer v. Brumfield*, 3 Munf. 122; *Coppage v. Barnett*, 34 Miss. 621. See *Thorpe v. Owen*, 5 Bear. 224; *Durrett v. Sewall*, 2 Ala. 669; *Wheeler v. Wheeler*, 43 Conn. 503; *Hitch v. Davis*, 3 Md. Ch. 266; *Cook v. Husted*, 12 Johns. 188.

There may be a valid gift of a chattel, reserving to the donor its use for life, *Davis v. Ney*, 125 Mass. 590; *Hope v. Hutchins*, 9 Gill & Johns. 77; *Conner v. Hull*, 36 Miss. 424; *Duncan v. Self*, 1 Murph. 466; *Howell v. Howell*, 7 Ired. 491; *McGinney v. Wallace*, 3 Hill (S. C.) 254; *Gadsden v. Whaley*, 14 S. C. 210; *McKane v. Bonner*, 1 Bail. 113. See, however, *Lance v. Lance*, 5 Jones 413; *Withers v. Weaver*, 10 Pa. St. 391; *Pitts v. Mangum*, 2 Bail. 588; *Caldwell v. Wilson*, 2 Spears 75; *Durham v. Dunkley*, 6 Rand. 135; *Anderson v. Thompson*, 11 Leigh 439.

A bank deposit receipt, *semble*, may not be transferred as a gift by mere delivery and endorsement, *Moore v. Ulster Bank, L. R. (11 Irish C. L.)* 512; *Dunne v. Boyd, L. R. (8 Irish Eq.)* 609; *Gerow's Case*, 5 Allen (N. B.) 512; *Hill v. Sheibley*, 64 Ga. 529; *Withers v. Weaver*, 10 Pa. St. 391; *Hassell v. Basket (Ind.)*, 18 Alb. L. J. 323; *Mead v. Mead (Eng.)*, 22 Alb. L. J. 359; *McCabe v. Robertson*, 13 U. C. C. P. 471. But see *Amis v. Witt*, 33 Bear. 612, 1 B. & S. 109; *McGrath v. Reynolds*, 116 Mass. 566; *Brooks v. Brooks*, 15 S. C. 422; *Westerlo v. De Witt*, 36 N. Y. 340.

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Howard institution. Between 1870 and 1874 she ordered that the following entry be made in her account in the Provident Institution, and it was made accordingly :

"Frank B. Smith, hatter, Danbury, Conn., son of Joseph Smith and Cornelia; to be drawn by Rachel; after death, by Frank."

In 1870 or 1871, she caused the following entry to be made in her account in her pass-book of the Howard Institution :

"This account is in trust for Frank B. Smith,"

and signed it with her name. She kept the pass-books of both

A special deposit of bank bills, sealed in an envelope, was made by A, payable to himself or order, and he afterwards endorsed the certificate of deposit to B.—*Held*, that B could hold the deposit against A's assignee, in insolvency. *Phillips v. Franciscus*, 52 Mo. 370. See *Young v. Young*, 80 N. Y. 422; *Welch v. Belleville Bank*, 94 Ill. 191; *Wyble v. McPheters*, 52 Ind. 393; *Southerland v. Southerland*, 5 Bush 591.

Where securities are sealed up, and endorsed with the intended beneficiaries' names, locked in a box, and the key retained by the donor, the gift is imperfect. *Bunn v. Markham*, 7 Taunt. 224; *Coleman v. Parker*, 114 Mass. 30; *Trough's Estate*, 75 Pa. St. 115; *Meriwether v. Morrison* (Ky.), 10 Reporter 661; *Bryson v. Browrig*, 9 Ves. 1. See *Hatch v. Atkinson*, 56 Me. 324; *Ellis v. Secor*, 31 Mich. 185; *Cooper v. Burr*, 45 Barb. 9; *Jones v. Selby*, *Pres. in Ch.* 300; *Stevens v. Stevens*, 5 T. & C. (N. Y.) 87; *Fowler v. Lockwood*, 3 Redf. 465; *Jones v. Brown*, 34 N. H. 439, 445; *Powell v. Hellicar*, 26 Beav. 261; *Walsh v. Sexton*, 55 Barb. 251; *Carradine v. Carradine*, 58 Miss. 286.

As to the effect of a deposit in the joint names of the depositor and another person, *George v. Bank of England*, 7 Price 646; *Ward's Case*, 2 Redf. 251; *Orphan Asylum v. Strain*, 2 Bradf. 34; *Condon v. Bank of B.*, MS. *Stevens's Dig.* N. B. 665. See *Mack v. Mack*, 5 T. & C. 528; *Marshall v. Crutwell*, L. R. (20 Eq.) 328.

A deposit in a savings bank of the depositor's money for the benefit of A. the depositor retaining the control of the fund during his lifetime, and A. having no notice thereof, has been held not to constitute a trust which A could afterwards enforce. *Brabrook v. Boston Bank*, 104 Mass. 228; *Clark v. Clark*, 108 Mass. 522; *Powers v. Provident Inst.*, 124 Mass. 377; *Stone v. Bishop*, 4 Clif. 593; *Weber v. Weber* (N. Y.), 9 Reporter 632; *Geary v. Page*, 9 Bosw. 290; *Meiggs v. Meiggs*, 15 Hun 453. CONTRA, *Witzell v. Chapin*, 3 Bradf. 386. See *Gaskell v. Gaskell*, 2 You. & Jer. 502; *Moore v. Moore*, L. R. (18 Eq.) 474.

But the rule is otherwise if the depositor inform A of the deposit, and that

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accounts in her own possession, and drew the dividends up to 1878, when she became insane, and she has ever since continued to be so. In that year she was duly declared to be of unsound mind, and her husband was duly appointed her guardian. The complainant is her nephew. He claims that, by the entries above mentioned, she declared a trust in his favor of the moneys in the two institutions, and that he is entitled to protection against her guardian, who claims the right to draw the money. It appears from the testimony that, though Mrs. Speer told the complainant that she had had all her money "put in trust" for

A is to have it after the depositor's death. *Gerrish v. New Bedford Inst.*, 128 *Mass.* 159; *Gardner v. Merritt*, 32 *Md.* 78; *Ray v. Simons*, 11 *R. I.* 266, 15 *Am. Law Reg. (N. S.)* 701, and note; 23 *Am. Rep.* 447, and note; *Vandenberg v. Palmer*, 4 *K. & J.* 204. Although there may have been no delivery of the bank-book. *Blasdel v. Locke*, 52 *N. H.* 238.

If A make a deposit in a third person's name, in order to avoid an attachment of the fund, and without an intention to donate it to such third person, he may afterwards recover it from the bank. *Broderick v. Waltham Bank*, 109 *Mass.* 149.

A made a deposit of her own money in the name of B, and it was so entered in the books of the bank. A retained the book until her death, and there was no proof that B ever knew of the gift during her lifetime, she having died before A.—*Held*, that the gift was perfect, and that the money belonged to B's estate. *Howard v. Windham Bank*, 40 *Vt.* 597.

A deposited \$250 in a savings bank in her own name as trustee for W., a lad who did errands for A, and A informed W.'s parents of the deposit. A kept the book, and afterward drew out all the deposit, together with the interest, appropriating it to her own use. At her death, she left a will, not mentioning the deposit, and not giving anything to W.—*Held*, that the gift was complete at the time of the deposit, and that A could not subsequently revoke it. *Minot v. Rogers*, 40 *Conn.* 512; also, *Thompson v. Gordon*, 3 *Strobh.* 196; *Trouell v. Carraway*, 10 *Heisk.* 104; *Marston v. Marston*, 21 *N. H.* 491; *Adams v. Nicholas*, 1 *Miles* 90, 2 *Whart.* 17; *Huntington v. Gilmore*, 14 *Barb.* 243; *Jones v. Selby*, *Proc. in Ch.* 300; *Merchant v. Merchant*, 2 *Bradfr.* 432; *Parker v. Ricks*, 8 *Jones* 447; *Hambroke v. Simmons*, 4 *Russ.* 25.

A deposited \$460 in a savings bank for E. K., her niece, and it was entered on the books of the bank "E. K.—M. K., guardian," and A informed the guardian thereof. The book was delivered to A, who retained it, and afterwards had the money transferred to her by M. K.—*Held*, a complete gift, and beyond revocation. *Kerrigan v. Rautigan*, 43 *Conn.* 17.

A deposit in trust for C has been held to raise a presumption that it was the money of C. *Millsaugh v. Putnam*, 16 *Abb. Pr.* 380.

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him, both he and she understood that he was not to have any of it until after her death. Both accounts were in her name. By the entry in the book of the Provident Institution, she declared no trust, but, retaining for herself the unlimited power to draw, authorized him to draw after her death. Though by the entry in the pass-book of the Howard Institution she declared that the account was in trust for him, she still kept the account in her own name, as she did that in the other institution. She not only kept both pass-books in her own hands, but drew money from both institutions upon them, up to the time when she lost her reason. The money was all her own. She never parted with the legal title to either fund. Without the produc-

Where D deposited money in the name of "D, for C," and took a note therefor payable "D, for C,"—*Held*, that C could recover the amount after D's death. *Smith v. Lee*, 2 T. & C. (N. Y.) 591.

A deposited a sum to the credit and in the name of his son G, and, shortly before his death, gave a box to C, stating that it contained his bank-book, and that he intended it for G, but he retained the key of the box until his death.—*Held*, that G could recover. *Vandermark v. Vandermark*, 55 How. Pr. 408.

S deposited \$500, "in trust for C," and afterwards drew out the interest herself. After S's death, the bank paid the amount to her administrator.—*Held*, that the title to the deposit vested in C at the time it was made, and that the subsequent payment to S's administrator was no defence to C's action for the fund. *Boone v. Citizens Bank*, 21 Hun 235; also, *Martin v. Funk*, 75 N. Y. 134; *Hunter v. Wallace*, 14 U. C. Q. B. 205.

A deposit was made subject to the order of the depositor or his daughter. On the death of the depositor, the daughter claimed that he had given her the bank-book and the money credited therein, to be held in trust by her for herself and her brothers and sisters.—*Held*, that the administrator was entitled to it, and not the daughter. *Murray v. Cannon*, 41 Md. 466; also, *Taylor v. Henry*, 48 Md. 550; *Brown v. Brown*, 23 Barb. 565; *Roman Catholic Asylum v. Strain*, 2 Bradf. 34; *Sheegog v. Perkins*, 4 Baxter 273.

Whether a gift of a savings bank book, by delivery, is valid as a *donatio causa mortis*, *Beak v. Beak*, L. R. (13 Eq.) 489; *McGonnell v. Murray*, 3 Irish Eq. 460; *Ashbrook v. Ryon*, 2 Bush 228; *Case v. Denison*, 9 R. I. 88; *French v. Raymond*, 39 Vt. 623; *Tillinghast v. Wheaton*, 8 R. I. 536; *Sheedy v. Roach*, 124 Mass. 472; *Brooks v. Brooks*, 12 S. C. 422; *Fiero v. Fiero*, 3 Hun 600; *Pierce v. Boston Sav. Bank*, 129 Mass. 425; *Conser v. Snowden*, 54 Md. 175; or, as a gift *inter vivos*, *Camp's Appeal*, 38 Conn. 88; *Hill v. Stevenson*, 68 Me. 364, 58 Me. 499; *Penfield v. Thayer*, 2 E. D. Smith 305; *Curry v. Powers*, 70 N. Y. 212; *Davis v. Ney*, 125 Mass. 500.

See, further, 1 *White & Tudor's Lead. Cas. in Eq.* *905.—*REP.*

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tion of the pass-book, no money could, according to their rules, be drawn from either institution. It is clear that she did not intend to part with her complete and absolute control over, and right to use and dispose of, the funds in question. Her design in making the entries evidently was to make a disposition of a merely testamentary character. The complainant has no claim to the interference of this court in the premises, and the advice of the vice-chancellor was therefore correct.

JAMES CHESTER

v.

JOHN HALLIARD et al.

In a bill filed by certain depositors of an insolvent savings bank (for which a receiver had been appointed), on behalf of themselves and such other depositors as might choose to join therein, against certain of the managers of the bank to compel the payment of so much of complainant's deposits as they may not realize out of the assets of the bank, two grounds of relief are set up: first, fraudulent public misrepresentations by the defendants, which induced complainants to become and remain depositors, and, second, culpable mismanagement of the bank's funds.

On demurrer for misjoinder and non-joinder—*Held*,

(1) That complainants cannot sue jointly for the misrepresentation, although it was general in character and addressed to the public; but they may, for the mismanagement.

(2) That suit should primarily be brought by the bank, but if it cannot or will not sue, then the depositors may proceed, but since the damages recovered would be assets of the bank, it or its receiver is a necessary party.

Bill for relief. On general demurrer.

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Mr. P. Bentley, Mr. J. B. Vredenburg and Mr. C. L. Corbin,
for demurrants.

Mr. John Linn, for complainants.

THE CHANCELLOR.

The bill is filed by certain depositors of the Mechanics and Laborers Savings Bank (of Jersey City) in behalf of themselves and such other depositors as may choose to join with them, against certain of the managers. The object is to compel payment by the defendants to the complainants respectively of so much of the amounts due them respectively from the bank as they shall fail to realize out of its assets. The ground of the claim is fraudulent misrepresentation by the defendants, by which the complainants were induced to become and remain depositors to their damage, and culpable mismanagement of the funds. On those heads the bill contains explicit and sufficient averments. The institution is insolvent, and on appropriate proceedings has been so declared and a receiver appointed. The defendants demur on the ground of misjoinder and nonjoinder. They insist that the complainants cannot sue jointly, but must sue separately, and that even if they can sue jointly, the bank or the receiver is a necessary party. The second proposition is true, and so is the first, so far as the charge of misrepresentation is concerned. The complainants cannot sue jointly for relief on that ground. Their claims are distinct and individual, and each must sue for himself. *Hinchman v. Paterson H. R. Co.*, 2 C. E. Gr. 75; *Jones v. Del Rio*, 1 T. & R. 297; *Story's Eq. Pl.* § 279. Nor does the fact that the misrepresentation was general in its character and addressed to the public at large change the situation or affect the rights of the parties in that respect, and enable the complainants to sue jointly. But as to the charge of mismanagement, the case is different, and the complainants can sue jointly. The defendants are liable to the corporation, whose agents they were, for any breach of the trust committed to their hands, and the corporation is primarily the proper party to bring suit for relief in the premises, if it will do so. Any damages

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which may be recovered in such suit would be assets of the corporation, for they would be awarded as, and intended to be compensation for, loss sustained by the institution. But if the corporation will not or cannot sue, its stockholders or others interested in its funds diminished by the alleged mismanagement may sue in their own names. See the cases cited in *Thompson on the Liability of Officers and Agents of Corp.* 391, 392, 393. One of the stockholders may sue or two or more may join. The complainants are interested, though to different extents, as depositors in the fund which, through the fraudulent mismanagement of the defendants, has been wasted. They are all interested in the recovery, but they are interested through the corporation, which is the entity which represents the interest of all the creditors. The defendants have the right to have the question of fraud tried once for all in one suit, and to be protected against a multiplicity of suits. When the recovery shall have been had, the damages will be paid over to the corporation; in this case to its representative, the receiver. There are obvious reasons why the bill in its present form, exhibited as it is for the sole benefit of the complainants and such other depositors as may join them, cannot be entertained. Apart from other considerations, to permit each depositor, or any number of them less than the whole, to sue for themselves on their own account, would be practically, if there were a recovery, to take the money of one *cestui que trust* to pay the claim of another, for the wasted funds in fact belonged not to the suing depositor or depositors alone, but to them and other depositors and the other creditors of the corporation, and the damages should go in like manner. There may be debts entitled to preference over the claims of the depositors, and it would manifestly be unjust to the holders of such claims as it would to the non-joining depositors to ignore their rights by giving to the depositors or stockholders prosecuting the suit the avails of the recovery as the reward of their diligence. It appears from the bill that the corporation is insolvent and in liquidation under the authority of this court. It is, therefore, not necessary, in order to authorize the maintenance of the suit by the complainants, that they should aver that the

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corporation has failed or refused to bring the suit, but the receiver should be made a party defendant. The demurrer will be allowed.

WALWORTH PATTISON

v.

WILLIAM H. SKILLMAN, JUN.

In 1876, defendant obtained possession of certain letters, documents &c., alleged to be valuable in establishing complainant's heirship to a foreign estate, for the purpose of investigating the claim, and to prosecute it for a share, if successful. He further agreed to return the papers on demand, but refuses to do so, and has taken no steps to obtain the estate.—*Held*, that the court had power to order the papers to be delivered to complainant.

Bill for relief. On general demurrer. On briefs of counsel.

Mr. J. Schomp, for demurrant.

Messrs. Bartine & Griggs, for complainant.

NOTE.—On the ground of trust, equity has decreed the delivery of chattels in the following instances: iron to be delivered to the bearer of a written instrument, on which the vendee obtained a loan, the instrument stating that the vendor had been paid for the iron, *Pooley v. Budd*, 14 Beav. 34. See *Parker v. Garrison*, 61 Ill. 250; *Clark v. Flint*, 22 Pick. 231. A partnership book, which, on dissolution of the firm, it was agreed should be delivered to complainant, *Lingen v. Simpson*, 1 Sim. & Stu. 600; securities where defendant admits having made the investment for complainant's benefit, *Stanton v. Percival*, 5 H. L. C. 257; a patent, in which the parties were to have a mutual interest in consideration of contributing towards obtaining it, and also of a compromise of pending litigation which was afterwards continued by defendant, *Marsh v. Milligan*, 3 Jur. (N. S.) 979. See *Somerby v. Buntin*, 118 Mass. 279. A contract for the purchase of lands, where complainant repudiated the contract because defendant could not make good title, *Wythes v. Lee*, 3 Drax. 396; court rolls to those entitled thereto, *Brown v. Brown*, 1 Dick. 62. See

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THE CHANCELLOR.

The bill is filed to recover possession of certain papers (letters, power of attorney, receipt and written testimony of witnesses) belonging to the complainant, and which he alleges are of great value to him in establishing his heirship to a considerable landed estate in Ireland. It states that in or about February, 1876, the complainant's mother delivered the papers in question to his sister and the defendant for examination; that they examined them, and the latter took them in order to give the matter a thorough examination, and it was then agreed by those persons that if the defendant could establish the complainant's title and obtain the estate, he should have part of

Reg. v. Hopkins, 1 Q. B. 161; *Raves v. Raves*, 7 Sim. 624. A client's papers, where the clerk of the court had loaned the client's solicitor money thereon, *Grey v. Cockeril*, 2 Atk. 114; mortgages put into B's hands to collect, and which B pawned to defendant for a personal loan, *Jackson v. Buller*, 2 Atk. 306; a deed in the hands of one who had executed it for the benefit of a woman with whom he had been living in adultery, and also for her children, and delivered it to an attorney and afterwards repossessed himself thereof, *Knyc v. Moore*, 1 Sim. & Stu. 61. See *Tyson v. Harrington*, 6 Ired. Eq. 329; *Travis v. Tyler*, 7 Gray 146; *Doyle v. Murphy*, 22 Ill. 502; *Duke v. Spangler*, 35 Ohio St. 119; *Hamilton v. Hamilton*, 9 Cl. & Fin. 327. Books of account in which an executor had mingled his fiduciary transactions with those of his partners, *Freeman v. Fairlie*, 3 Mer. 28; maps and plans which a discharged surveyor retained, *Breresford v. Driver*, 14 Beav. 387, 16 Beav. 134; deeds of a remainderman on which the solicitor of the life-tenant claimed a lien for costs, after such life-tenant's death, *Turner v. Letts*, 20 Beav. 185; the certificate of registry of a ship, on which the master and ship brokers claimed a lien for advances &c., *Gibson v. Ingo*, 6 Hare 112; the original letters, journals &c., of a wife, which the husband had, by their deed of separation, covenanted to deliver, and also copies thereof made by him afterwards, *Hamilton v. Hector*, L. R. (13 Eq.) 511; furniture, which, after a levy thereon by the sheriff, and payment of the judgment by defendant's friends, was left in his possession until his death, *Edwards v. Clay*, 28 Beav. 145; bank notes found and delivered for safe keeping to a gratuitous bailee, who refused to return them, *Bridges v. Hawkesworth*, 15 Jur. 1079; *Tancil v. Seaton*, 28 Gratt. 601. See *McAvoy v. Medina*, 11 Allen 548; *McLaughlin v. Waite*, 9 Cow. 670, 5 Wend. 404; *New York R. R. v. Hays*, 56 N. Y. 175; *Tatum v. Sharpless*, 6 Phila. 18; *Cartwright v. Green*, 8 Ves. 405; *Durfee v. Jones*, 11 R. 1. 586; stock of a corporation which plaintiffs, by agreement, subscribed for in defendant's name, and for which plaintiffs were to pay in case of defendant's inability

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the latter for his services; that he agreed to return the papers on demand, but has not done so, and not only refuses to return them, but refuses even to produce them or allow the complainant to make copies of them, sometimes denying the complainant's right to them and claiming them as his own property, and at others pretending ignorance as to where they are, and the complainant avers that the defendant has done nothing towards obtaining the estate. On demurrer, all the relevant facts of the bill which are well pleaded are admitted, and I am not called upon now to pass upon the validity of the complainant's claim of heirship stated in the bill. No attempt is made in the briefs to sustain or impugn it. The bill states that the complainant is

ity, and did pay, *Cowles v. Whitman*, 10 Conn. 121; *Austin R. R. Co. v. Gulaspie*, 1 Jones Eq. 261; *Paine v. Hutchinson*, L. R. (3 Ch.) 388; *Gardner v. Pullen*, 2 Vern. 394; *Cravens v. Cravens*, Morris 285; *Kellogg v. Stockwell*, 76 Ill. 68; *Odesa Co. v. Mendel*, L. R. (8 Ch. Div.) 235; *Brick v. Brick*, 2 McARTH. 256; stock was given to a tenant for life with remainder to the donor's living children, and invested in the name of "the heirs of W. D." After the death of the life-tenant, the bank was compelled to transfer the stock to plaintiff, the donor's only living child, *Hill v. Rockingham Bank*, 44 N. H. 567; a transfer of an undivided half interest in a steamboat, *Peer v. Kean*, 14 Mich. 354. See *Hart v. Herwig*, L. R. (8 Ch.) 860; *Graham v. Cook*, 48 Ala. 103; stocks bought with notice of a trust, and still remaining in the vendee's hands, *Abbott v. Reeces*, 49 Pa. St. 494; or a bill of exchange, *Prather v. Weissiger*, 10 Bush 129; *Webb v. Graniteville Co.*, 11 S. C. (N. S.) 396; furniture in mortgagor's hands, *City Council v. Page*, Spear's Ch. 159; a written transfer of an interest in the possession of land, *Johnson v. Rickett*, 5 Cal. 218; the assignment of a patent, *Corbin v. Tracy*, 34 Conn. 325; *Binney v. Annan*, 107 Mass. 94. See *Burr v. Gregory*, 2 Paine 426; a policy of insurance, *Carpenter v. Mutual Ins. Co.*, 4 Sandf. Ch. 408; *Woody v. Old Dominion Ins. Co.*, 31 Gratt. 362; notes overdue and paid by an agreement between the maker and holder, *Tuttle v. Moore*, 16 Minn. 123; *Smith v. Smith*, 3 Stew. Eq. 564; *Greenabaum v. Elliott*, 60 Mo. 25; *Breathwit v. Rogers*, 32 Ark. 758. See *Atwood v. Fisk*, 101 Mass. 363; a new note where the maker destroyed the original of which he had obtained possession under a promise to return it or execute a new one, *McMullen v. Vanzant*, 73 Ill. 190. See *Mathison v. Wilson*, 87 Ill. 51; a duplicate agreement for the sale of lands, remaining in the vendor's hands, *Hu'l v. Noble*, 40 Me. 459; an award transferring to a tanner the use of vats &c., *Kirkey v. Fike*, 27 Ala. 383. See *Turpin v. Banton*, Hardin 321; where one of two defendants holds a covenant, and the other the fund to carry out the covenant, *Ashe v. Johnson*, 2 Jones Eq. 149; plans, maps and surveys left with the defendant, who rented

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entitled to the estate as heir, and that he cannot establish his claim without the documents in question. It also appears from the bill that the defendant obtained them from him in a fiduciary relation. This court has jurisdiction to enforce the restitution or delivery of a specific chattel which has a peculiar artificial value, and for which, therefore, adequate compensation cannot be obtained at law; and that, too, whether possession has been got by the wrong-doer through a trust or not. *Jeremy's Eq. Jur.* 467; *Story's Eq. Jur.* § 709. In *Wood v. Rowcliffe*, 2 *Phillips* 382, *S. C.* 3 *Hare* 304, it was held that the jurisdiction is not

the same office after complainant had temporarily given up business as a surveyor, *McGowin v. Remington*, 12 *Pa. St.* 56; declarations of sale which are mere nullities, *Foley v. Kirk*, 6 *Stew. Eq.* 170; one of several instruments, where the others have not been executed, *Madox v. McQueen*, 3 *A. K. Marsh.* 400; a deed which defendant promised, but failed to execute according to contract, *Farrar v. Bridges*, 5 *Humph.* 411; *Jones v. Petaluma*, 36 *Cal.* 230. See *Goodman v. Randall*, 44 *Conn.* 321; *Bury v. Inness*, 35 *Mich.* 189; *Conlin v. Ryan*, 47 *Cal.* 71; *Davis v. Henry*, 4 *W. Va.* 571; *Wilson v. Getty*, 57 *Pa. St.* 266; *Arnold v. Cord*, 16 *Ind.* 177; a draft which defendant had agreed to accept in payment of articles purchased by plaintiff, *Saulsbury v. Blandeys*, 60 *Ga.* 646, 53 *Ga.* 665; a bond deposited in escrow, *Carter v. Turner*, 5 *Sneed* 178. See *Hoig v. Adrian College*, 83 *Ill.* 267; a note or bond delivered on a condition which failed, *Simes v. Everson*, 46 *Pa. St.* 304; *Shaw v. Burney*, 1 *Ired. Eq.* 148; grain in the hands of an insolvent defendant, who has been paid therefor, or in the hands of his consignees, *Sullivan v. Tuck*, 1 *Md. Ch.* 59; *Parker v. Garrison*, 61 *Ill.* 250; books and letters of a corporation in the hands of its late president, after his successor had been elected, *Hardecastle v. Maryland R. R.*, 32 *Md.* 32; a mortgage which, after delivery, had been entrusted to the mortgagor to have recorded, which he refuses to record or deliver, *Pierce v. Lamson*, 5 *Allen* 60; a note which testator promised to give to his father, and would have done so in his will but for the dissuasion of his wife, who afterwards claimed it as executrix, *Richardson v. Adams*, 10 *Yerg.* 273.

Interference has been refused in the following cases: *Ferguson v. Paschall*, 11 *Mo.* 267; *Roundtree v. McLain*, *Hempst.* 245; *Madison v. Chim*, 3 *J. J. Marsh.* 230; *City Ins. Co. v. Olmsted*, 33 *Conn.* 476; *Pierce v. Plumb*, 74 *Ill.* 326; *Post v. Marsh* (*Eng. Ch.*), 23 *Alb. L. J.* 199; *Foll's Appeal*, 91 *Pa. St.* 434; *Ross v. Union Pacific R. R. Co.*, 1 *Woolw.* 26; *Fallon v. Missouri Railroad Co.*, 1 *Dill.* 121; *Danforth v. Phila. R. R.*, 3 *Stew. Eq.* 12; *Noyes v. Marsh*, 123 *Muss.* 286; *Cone v. East Haddam Bank*, 39 *Conn.* 86; *Wyatt v. Mayfield*, 91 *Ill.* 577; *McNeil v. Ames*, 120 *Mass.* 481; *Stewart's Appeal*, 73 *Pa. St.* 88. See, also, 1 *White & Tudor's Lead. Cas. in Eq.* *821.—REP.

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confined to such cases, but extends to those where a party has obtained possession of chattels through an alleged abuse of power on the part of one standing in a fiduciary relation to the complainant. The demurrer will be overruled.

MARTHA W. CLAWSON

v.

JOSEPH K. RILEY et al., executors of Isaiah D. Clawson,
deceased.

C. was the administrator of his wife's father, sole acting executor of her brother and sole executor of her mother, and complainant (C.'s wife) had an interest in each of those estates. On bill filed after her husband's death, against his executors to recover her several unpaid shares—*Held*,

(1) That they must account for the principal and interest of securities, standing in C.'s name, which were taken by the complainant as part of her father's estate, and which C., instead of assigning to her, caused them to be assigned to himself.

(2) That complainant's receipts for payments on account of her shares, given to C. at different times, are conclusive as against her unsupported testimony, if it were competent (but, under the circumstances, it is not), denying the several payments, because they show that, if the payments were never in fact made, she voluntarily discharged C. therefrom.

(3) That complainant's testimony is not competent to disprove allegations in the answer, where the answer itself, although in one sense responsive, is not evidence; nor can she, under *P. L. of 1880 p. 52*, testify as to transactions with her husband, either by general or detailed statements.

Bill for relief. On final hearing on pleadings and proofs.

Mr. E. Dudley, Mr. T. H. Dudley, and Mr. Bradbury Bedell,
of Philadelphia, for complainant.

Mr. E. S. Fogg and Mr. M. P. Grey, for defendants.

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THE CHANCELLOR.

This suit is brought by the widow of Dr. Isaiah D. Clawson, late of Salem county, against his executors, to recover securities and money belonging to her, which, she alleges, he received during the marriage. The property in question was her distributive share of the estate of her late father, William J. Shinn; residuary legacies given to her by the wills of her brother, Samuel S. Shinn, and her mother, Margaret C. Shinn, and the money, principal and interest, due on a bond given to her by her father. Dr. Clawson was sole administrator of her father's estate; sole acting executor of her brother's will, and sole executor of the will of her mother. The complainant was married to Dr. Clawson, December 13th, 1850. He died October 8th, 1879. Her father died February 10th, 1868; her brother Samuel, January 17th, 1869, and her mother, December 13th, 1869. Letters of administration on her father's estate were granted to Dr. Clawson, by the surrogate of Salem county, February 15th, 1868. The inventory of the estate amounted to \$86,102.11, and the administrator, subsequently to the filing of the inventory, received property of the estate not inventoried, amounting to \$2,870.86. So that the estate which came to his hands, and for which he was accountable, amounted to \$88,972.97. The complainant's distributive share was, according to the bill, \$12,446.17. In addition to this there were due her from the estate \$4,871.66, for principal and interest on a bond for \$4,000 and interest, given to her by her father, and held by her at his death. In his account of his administration, Dr. Clawson credits himself with \$11,700.46 as paid to her for the distributive share, and \$4,871.66 as paid to her for the principal and interest of the bond. The complainant in her bill alleges that, according to his accounts, \$4,108.63 of that estate were never distributed or accounted for in any way. By the will of her brother Samuel, the residue of his estate was given to his next of kin, who were his mother, his sisters, Emeline W. Shinn and the complainant, and the two children, Emeline S. and Charles H. Reed, of his deceased sister, Mary W. Reed. Dr. Clawson, as his executor, was chargeable with the inventory, \$11,173 and \$1,318.03 for property after-

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wards received, altogether \$12,491.03. The residue was \$6,264.34, the complainant's share of which was \$1,566.08. By her mother's will, the residue of the estate of the latter was to be divided into three parts, one of which was given to the complainant. The inventory of that estate amounted to \$29,248.01, and Dr. Clawson, the executor, received other property, not inventoried, to the amount of \$3,203.12, altogether \$32,451.13. The residue amounted to \$28,483.25, the complainant's share of which was \$9,494.41. Dr. Clawson left a large estate. The inventory of his personal property amounted to \$98,748.36; and his real estate was valued at not less than \$25,000. By his will he gave his widow his household goods and bequeathed certain legacies, amounting in all to \$12,800, and then gave to his widow the use of all the residue of his property for life, with remainder to their son, who is still living. The complainant admits that she has received on account of the moneys coming to her from the three estates in question \$8,070.75, but alleges that she has never received anything more on account of the distributive share, legacies and bond above mentioned. The \$8,070.75 are the amount of certain bank, railroad and turnpike stocks in her name, found in Dr. Clawson's iron safe after his death. For some, the greater part of those moneys, however (except what she claims is due her for her share of the \$4,108.63 of her father's estate, which she insists has never been distributed or accounted for), Dr. Clawson held receipts drawn by him and signed by her. All of those receipts, except three, and those are for moneys due her from her mother's estate, simply acknowledge the receipt of the money mentioned thereon, stating the account on which it was received. Those three receipts show how the money therein mentioned was paid. One is for \$13 for a set of harness and a horse blanket taken at the appraisement; another is for \$2,900, part of complainant's residuary legacy under her mother's will, and contains this memorandum, "50 s. L. V. R. R.," evidently signifying that the payment was with fifty shares of stock of the Lehigh Valley Railroad Company. The third is for \$4,190.55 on the same account, with a memorandum showing (it also appears otherwise) that it was paid by the transfer of a bond and mort-

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gage for \$4,000, given by Henry C. Summerill to William J. Shinn. Apart from the receipts there is no evidence that the money mentioned in them was received by the complainant. Dr. Clawson was a very methodical, careful and painstaking man of business. From his books the mode in which he made the payments of the moneys receipted for to others than the complainant, can readily be traced. In his account contained in his book of his transactions in settling the estate of William J. Shinn, he states in a memorandum how the respective shares of Emeline W. Shinn and the Reed children were paid; but though he sets down the amounts mentioned in the various receipts signed by the complainant, he does not say how they were paid, nor that they were, in fact, paid at all. With regard to Samuel S. Shinn's estate he held no receipt of the complainant except one for \$20, which appears to have been the appraised value of some article or articles in the inventory taken by her. As to the rest of her legacy (according to his book, \$1,546.08), there is not only no evidence that he ever paid it, but, from the entries in his book, it is quite clear that he never did. Of the amount receipted for on account of the legacy given to her by her mother's will, \$4,190.55 appear, as before mentioned, to have been paid by the Summerill mortgage, which originally belonged to her father's estate. Dr. Clawson, as administrator of that estate, assigned it to the widow on account of her distributive share. At the death of the latter it constituted part of her estate, and it was assigned by him as her executor, on the 30th of November, 1870 (the date of the before-mentioned receipt given him by the complainant for \$4,190.55), to Isaac Scull, without consideration, and merely in order that the latter might re-assign it to him, which he did on the next day, without consideration, and Dr. Clawson received the interest upon it from that time until his death, and he then still held the mortgage. There is reason to believe, and ground for adjudging, that Dr. Clawson held this mortgage in trust for the complainant. He appears to have given it to her, and she received it on account of her legacy under her mother's will. Instead of assigning it to her, he caused it to be assigned to himself. The assignments from himself to Scull, and from

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the latter to him, are proved to have been entirely without consideration. Under the circumstances it will be presumed that Dr. Clawson held the mortgage in trust for the complainant.

But the like presumption is not raised as to any other of the mortgages mentioned in the bill, and which he caused to be assigned to himself. He was chargeable with them as part of the inventory, and answered for the amount in his accounts. The English mortgage, it may be observed, belonged to the estate of Samuel S. Shinn, and in making up the amount of the residuary legacies Dr. Clawson charges himself with it. As before stated, the complainant's legacy, under her brother's will, has not been paid to her. She has received only \$20 on account of it. Dr. Clawson's estate should be charged with the entire balance of her legacy, and she therefore can have no claim to that mortgage. As to the other mortgages, as before suggested, the presumption is that they were his own property, for he duly accounted for them.

But it is urged on her behalf that she herself testifies that she has never received any of the moneys for which she gave the receipts to her husband. Her testimony on that head, however, is objected to as incompetent. Her counsel insist that it is competent under the sixth section of the act concerning evidence (*Rev. 379*), inasmuch as the answer "charges" that she received the money in question, and this they insist is responsive to the bill. That section provides that the complainant or petitioner in any action or proceeding of an equitable nature, in any court, shall be a competent witness to disprove so much of the defendant's answer as may be responsive to the allegations contained in the bill of complaint or petition. But clearly the complainant in this case is not made competent by that section. The intention of the legislature, in the provision just quoted, is easily discernible. It is to render the complainant competent to testify in rebuttal of so much of the answer as will be evidence against him. But the statements which it is claimed render the complainant in this case competent to testify, are not evidence. They are merely expressions of belief on the part of the defendants that the complainant received the moneys, and

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"charges" that such is the fact; while in the same answer the defendants expressly deny that they have any knowledge or information on the subject, except from the allegations of the bill and the accounts rendered by their testator of the respective estates in the orphans court. Obviously, such an answer is not evidence, though it is in a sense responsive; that is, a reply to the allegation of the bill to which it is directed and relates. *Pellatt v. Ferrers*, 2 Bos. & Pul. 542; *Gres. Eq. Ev.* 430, n. a. A "charge" has no place in an answer. It is appropriate to a bill alone. It is an allegation of matters which disprove or avoid a defence which it is alleged the defendant is supposed to pretend or intend to set up. *Story's Eq. Pl.* § 31. In the answer under consideration the "charge" is merely equivalent to, and, manifestly, was intended as, a protestation.

By the act of 1880 (*P. L. of 1880 p. 52*), the complainant is rendered competent to testify, notwithstanding the fact that the defendants are sued in a representative capacity, except as to any transaction with, or statement by, her husband. Her testimony on the subject of the receipts that she never in fact received the money, the receipt of which she thereby acknowledges, is incompetent; for it is of a transaction with her husband. And so, too, of her testimony as to the fact that she never received any of the moneys (with certain exceptions) coming to her from the estates of her father, mother and brother, for it involves the same transactions with her husband, and such testimony is merely a general statement of the same matters which she is prohibited from testifying to in detail. As she is incompetent to testify that she did not receive the moneys mentioned in the particular receipts, she is equally so to testify that she received none of the moneys mentioned in any or all of them. The complainant is entitled to the Summerill mortgage and an account of the interest collected thereon by Dr. Clawson. Under the circumstances it will be adjudged that he received and held it for her as her trustee. *Vreeland v. Vreeland*, 1 C. E. Gr. 512; *Horner v. Webster*, 4 Vr. 387. She is also entitled to the amount of her legacy under her brother Samuel's will (less \$20 which she appears to have received), with interest

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never been paid to her. Dr. Clawson settled his account of that thereon from the time when it was payable to her. That has estate in 1870, and appears to have retained her legacy (except the \$20) in his hands up to the time of his death. As to the rest of the moneys in question, there is evidence, by her receipts, that they were paid to her, and that she discharged her husband from them. It is enough to say that there is no evidence that he retained them and did not pay them to her; but it may be added that, if there were, there is no evidence that he retained or received them under such circumstances as would make him or his estate accountable to her. Though there is no evidence from his books, apart from the receipts, that he actually paid the moneys to her, the receipts are evidence of it, and they are not contradicted. The conclusion from them is, that if the moneys were not in fact paid, she voluntarily discharged him from liability to her for them. There will be a decree in accordance with the views above expressed. The complainant is entitled to costs, payable out of Dr. Clawson's estate.

GEORGE SCOTT

v.

THE ERIE RAILWAY COMPANY et al.

A bill against several defendants for a discovery, accounting and repayment of alleged unlawful overcharges for freight, the liability therefor being purely legal and enforceable at law, cannot be sustained, on the ground that one defendant is liable as the lessee of several short lines of railroad, and that the other defendants, the lessors, are also liable, and that if complainant be compelled to resort to law for redress, he must sue each defendant for a fractional part of each overcharge.

Bill for relief. On final hearing on pleadings and proofs.

Mr. T. D. Hoxsey, for complainant.

Mr. Cortlandt Parker, for defendants.

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THE CHANCELLOR.

The bill is filed for an account of moneys alleged by the complainant to have been paid by him to the defendants, which are the Erie Railway Company and its lessors, the Paterson and Ramapo Railroad Company, the Paterson and Hudson River Railroad Company, and the Long Dock Company, in excess of the lawful charges for freight carried by the Erie Railway Company, from Paterson to New York, for him, between the 1st of March, 1872, and the 1st of September, 1874. The bill states that the length of railroad between the depot at Jersey City and the city of Paterson is fifteen and sixty-three hundredths miles, which is made up of two and fifty-six hundredths miles of the railroad of the Long Dock Company, twelve and fifty-eight hundredths miles of the Paterson and Hudson River railroad, and forty-nine hundredths of a mile of the Paterson and Ramapo railroad; and that the Erie Railway Company, during all the period in respect of which the account is claimed, was operating that road under a lease from the railroad companies by which it was owned. The complainant insists that the latter companies are, as well as the Erie Railway Company, by which the alleged excessive charges were made, and to which the payments were made by him, liable to and bound to repay him. The answers of the defendants deny that the alleged illegal charges were made, and insist that all the charges complained of were lawful, and they also insist that the remedy of the complainant is at law. The prayer of the bill is that the Erie Railway Company, the Paterson and Hudson River Railroad Company, the Paterson and Ramapo Railroad Company, and the Long Dock Company may account with the complainant for the unlawful charges and tolls asked, demanded and received from him for freight and transportation between Jersey City and Paterson, either way, between the 1st day of March, 1872, and the 1st day of September, 1874; and that each of the three last-mentioned companies, as the lessor of the Erie Railway Company, be held to so account with him in proportion to the unlawful charge so made by its lessee, the Erie Railway Company, in proportion to the length of its road to the whole length of the road between Jersey City

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and Paterson ; and that, therefore, the Long Dock Company, as a lessor, responsible for such overcharges, be held to pay the complainant with respect to two and fifty-six hundredths miles ; the Paterson and Hudson River Railroad Company with respect to twelve and fifty-eight hundredths miles, and the Paterson and Ramapo Railroad Company with respect to forty-nine hundredths of a mile of the length of the whole road between those points. It prays, also, that the defendants may make discovery for all and singular the transactions and matters before stated, and that an account may be taken, by and under the direction and decree of this court, of the alleged unlawful charges, dealings and transactions complained of in the bill ; and that, in taking the account, the Erie Railway Company be primarily charged for the full amount of such unlawful charges, and that the other railroad companies, its lessors, be held secondarily chargeable, on failure or default of the Erie Railway Company to pay the amount, in proportion to their respective responsibility for the same, in the manner before stated, as to the length of their respective roads and their lawful right to charge freights thereon, or in some other manner as may be decreed to be just and equitable by this court, and that such other and general relief may be granted in the premises as may be consistent with equity and good conscience.

It seems to me quite clear that no discovery is required. The bill is based upon the allegations of unlawful charges, made by the Erie Railway Company against the complainant, for carrying freights over the road. The amount of the lawful charge is stated, and the amount of the unlawful demand and the amount paid. No discovery can be required, with regard to these matters. The bill is filed really to recover from the defendants the amount of these alleged unlawful charges. The complainant insists that he is entitled to the aid of this court in the premises, on the ground that he is entitled, by law, to look to the lessors, as well as the lessees, for repayment of the moneys in question, and that if he were to have recourse to law for a remedy, he would be compelled to sue each of the lessors for a fractional part of the amount. He claims, as before stated,

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that the Erie Railway Company is legally responsible for the excessive charges, and that the lessors of that company are also liable according to the proportions which their respective lengths of road bear to the whole. He was at liberty, therefore, to proceed at law against the Erie Railway Company, or against its lessors. Their liability to him (if it exists) is a purely legal one, and the proportions of the amount of the excessive charges which they should repay to him can be as well established at law as in this court. Indeed, he has stated them with clearness in the bill, and prays for a decree according to the proportions which are so stated. This objection having been taken in the answers, there is no reason why it should not be regarded on the final hearing. It seems to be entirely clear that the remedy of the complainant is at law and not in this court. The bill, therefore, will be dismissed, with costs.

BENJAMIN L. LUDINGTON, guardian &c.,

v.

THE CITY OF ELIZABETH.

PHILO C. CALHOUN et al.

v.

THE CITY OF ELIZABETH.

Sales of land under municipal assessments based on an unconstitutional statute, and sales, for taxes, to the city for a term of years exceeding that limited by the charter, are clouds on the title of such lands which this court may remove.

Ludington v. City of Elizabeth.—Calhoun v. City of Elizabeth.

Bill to quiet title. On final hearing on bill and answer and statement of facts agreed upon.

Mr. G. P. Smith, for complainant.

Mr. W. R. Wilson, for defendant.

THE CHANCELLOR.

The clouds which this suit is brought to remove, arise from a sale of the complainant's land to the defendant, under municipal assessment proceedings founded on a law which, it is admitted, is unconstitutional, and sales to the defendant of the land for unwarranted terms of years, for taxes assessed under due authority of law, indeed, but, as alleged, not on due notice. All of the sales for taxes were for terms of nine hundred years respectively, and all the sales were followed by certificates of sale. The case as to the sale under the assessment proceedings, is ruled exactly by the decision in *Bogert v. City of Elizabeth*, 12 C. E. Gr. 568, and the other sales (for taxes) are also within that decision; for, being each for a term unwarranted by the charter, which authorized sales to the city for terms of fifty years respectively, but no longer (*Schatt v. Grosch*, 4 Stew. Eq. 199), they were and are nullities, and under the act to compel the determination of claims to real estate in certain cases, and to quiet the title to the same (*Rev. 1189*), under which this suit is brought, the complainant is entitled to relief in the premises in this court. *Bogert v. City of Elizabeth*, *ubi sup.*; *Jersey City v. Lembeck*, 4 Stew. Eq. 255, 272. There will be a decree accordingly.

THE CHANCELLOR.

It is admitted that all the assessments, except one, under which the sales complained of took place, were made under an unconstitutional law, and that all the sales, whether for assessments or taxes, were made for terms (nine hundred years) unau-

Newman v. Warner.

thorized by the charter of the city. The sales are all nullities. The complainants are entitled to the relief which they seek. The views expressed in *Ludington v. City of Elizabeth*, decided at the present term, are applicable to this case.

GEORGE K. NEWMAN

v.

JOHN W. WARNER et al.

A testator gave the use of all his estate to his widow for life, and gave to complainant, among others, a pecuniary legacy, payable after the widow's death. He appointed his widow and another person executors, and they are both dead. Administrators *cum testamento annexo* were appointed, and in a suit in this court against the widow's executor he was ordered to pay them certain moneys and to deliver certain securities, and they were also ordered to settle their final account in the orphans court. They have done nothing whatever, owing to disagreements among themselves.—*Held*, that, while this court could not remove them, it could compel them to account here, with a view to the payment of complainant's legacy, and to execute the other trusts of the will.

Bill for a legacy.*Mr. C. D. Thompson*, for complainant.

THE CHANCELLOR.

The bill is filed by a legatee under the will of George Konkle, deceased, against his daughter, Mrs. Harriet Warner, and her husband, John W. Warner, as administrators *de bonis non cum testamento annexo* of his estate, and others. Its object is to compel payment of the complainant's legacy. The bill states that

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the testator died in 1868; that by the will the use of all his property was given to his widow for life; that his widow and Nathan Roe were his executors; that the widow survived her co-executor; that she died in 1877; that after her death and in May, 1878, the administrators were appointed; that they brought suit in this court against her executor to recover property alleged to belong to the estate of their testator, and were successful; that by a decree of this court in that cause, made in February, 1881, her executor was ordered to pay to them certain moneys, and to deliver to them certain securities to be administered by them, and that it was thereby also ordered that they make their final account and settlement of the estate in the Sussex orphans court. The bill further states that the administrators have never collected any of the money, nor received the securities, or any of them, which were awarded to them by the decree, nor made any effort in that direction; that there are in the hands of the widow's executor, due to and receivable by the administrators, the sum of \$1,860.16 in money, and securities to the amount of \$5,645 and interest, more than enough to pay the general legacies, which are only \$1,000, besides interest; and that the complainant has tendered a refunding bond and demanded payment of his legacy, but in vain. The bill prays that the administrators may be removed from their office, or that the widow's executor may be decreed to pay the complainant's legacy, and be credited with the amount paid on the money due from him to the administrators, and there is a prayer for general relief. There is no answer. By the proofs, it appears that the administrators are prevented from settling the estate by their disagreement with each other. By his will, George Konkle gave to his son Peter and his grandson, the complainant, each \$500, payable in one year after the death of his widow, and after deducting those legacies, he gave half of the residue to Mrs. Warner, and directed that the other half be invested and the interest paid to his daughter, Lauretta McCann, during the lifetime of her husband, with directions that if she should survive her husband, the principal be paid to her on his death; but if she should not survive him, then that, on her death, the principal be divided among her

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children. Mrs. McCann and her husband are both alive. It appears by the proofs that the administrators have never filed any inventory, nor taken any action in reference to the estate, since they were appointed. It also appears that the widow's executor is, and has been, ready to comply with the decree before mentioned. The decree that the administrators account and settle in the Sussex orphans court was a mere direction that they settle there instead of here. This court cannot remove them from their office. *Leddel's Exr. v. Starr*, 4 C. E. Gr. 159. But it may compel them to account, with a view to the payment of the complainant's legacy and the investment of that of Mrs. McCann. No misconduct is charged in the bill, except the failure to get the money and securities awarded to them by the decree. Their testator has been dead about thirteen years. There are probably no debts due from his estate, and nothing remains to be done but to collect the assets and distribute them according to the directions of the will. They make no answer, and give no reason why they should not be decreed to pay the complainant's legacy. But it appears that they have not, in fact, because of their disagreement, got the money and securities from the widow's executor, and it does not appear that there are any other assets. There will be an order that they proceed to collect the assets and settle their accounts in this court.

SOPHIA DENZLER

v.

ARTHUR O'KEEFE et al.

B. held lands in trust for the benefit of a married woman. Afterwards, a mortgage on the same lands, given by his *cestui que trust* and her husband before the conveyance to him, was assigned to him on his paying it. He conveyed the lands, pursuant to the direction of his *cestui que trust*, subject to the mortgage, and assigned the mortgage at the same time to his grantee.—*Held*, that

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there was no merger of the mortgage in B.'s hands, and that judgments against him, recovered before his conveyance of the premises, were not liens thereon.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. T. F. McCormick, for complainant.

Mr. G. Berry, for answering defendants.

THE CHANCELLOR.

The complainant files her bill to foreclose a mortgage given in 1870 by Patrick O'Keefe and his wife to the Rahway Savings Institution on land in Rahway, for \$1,000 and interest. The mortgage was assigned by the savings institution to Joseph Brunt, May 14th, 1875, and he assigned it to the complainant February 19th, 1880. On that date he conveyed the mortgaged premises to the complainant, subject to the mortgage, the amount due him whereon she then paid him. He at that time held the title to the land as he had done since February, 1874, in trust for Mrs. O'Keefe, and had, while he so held the title, paid the savings institution the money due on the mortgage, and taken the assignment of it before mentioned. The only consideration of the conveyance from him to the complainant appears to have been the amount due him from Mrs. O'Keefe for money paid by him for the mortgage. He gave to Mrs. O'Keefe in February, 1876, a declaration of trust, by which he acknowledged and declared that he held, and would continue to hold, the property in trust for her, and that he had no beneficial interest therein except to secure the repayment to him of \$900, in the declaration of trust said to be for money advanced by him to buy the property at sheriff's sale to save it for her, but really, as it proves, the amount due him for money paid for the mortgage, and agreed to convey the property to her on receiving that money or security therefor. The declaration, however, was not recorded until October 15th, 1879. Various judgments were recovered against him, some against him alone and some against

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him and his son, James H. Brunt, before that instrument was recorded, one by McLaren and Raynor, May 19th, 1876, for \$93.20, and another by them December 10th, 1876, for \$102.40, both docketed in the court of common pleas on February 27th, 1877. On those judgments in favor of McLaren and Raynor, execution had, when the conveyance was made by Brunt to the complainant, been issued and levied on the land as the property of Brunt. It appears that the complainant, when she took her conveyance, was aware of the existence of those two judgments, but not of any others affecting the title. Brunt agreed with her that with part of the money which she paid him he would pay off the McLaren and Raynor judgments, and cause them to be assigned to her for her protection, and he did so. When, under the direction of her attorney, she proceeded to sell under those judgments, she found that executions on others of the before-mentioned judgments had been issued after the conveyance to her, and levied on the property. She therefore abandoned the plan of proceeding to sell under the judgments to obtain a title clear of the judgments against the Brunts. She subsequently filed her bill in this suit to foreclose her mortgage. The answering defendants, who are some of the judgment creditors of the Brunts, and Berry & Lupton, judgment creditors of Mrs. O'Keefe, whose judgments were recovered and docketed in 1874, insist that the complainant's mortgage was paid off by Brunt and extinguished, and that even if it were not extinguished, it was merged in the conveyance to the complainant. That it was not extinguished when he paid the amount due on it to the savings institution, is clear. He took an assignment of it, and it so became his own property. Though he then held the title to the land, it was only in trust for Mrs. O'Keefe, and as security for the payment to him of the money he had paid for the mortgage. When the complainant took title for the property she took it subject to the mortgage, and took an assignment of it. The mortgage was actually and apparently a valid and subsisting security. Her object in taking it was to protect her title by means of recourse to it if necessary. She evidently intended that there should be no merger. It may be remarked that though the declaration of

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trust was not recorded until 1879, the complainant had not been out of possession of the property, but lived on it during all the time that the title was held by the Brunts. They had only the legal title, and no equitable title at any time, except as security for money paid, and they had been repaid all their advances except the amount due Joseph for money paid for the mortgage. Joseph Brunt and his son, James H., who afterwards released to him, bought the property in February, 1874, for Mrs. O'Keefe, at a sale thereof under judgments against her, and one or both held it in trust for her thereafter. Their judgment creditors have no claim upon it in equity. The lien of a judgment does not, in equity, attach to the mere legal title to the land as existing in the defendant at the time of its rendition, to the exclusion of a prior equitable title in a third person. *Brown v. Pierce*, 7 Wall. 205; *Morris v. Mowatt*, 2 Paige 586. If a purchaser under the judgment has notice of the equitable title at any time before the purchase and the actual payment of the money at the sheriff's sale, he cannot protect himself as a *bona fide* purchaser. *Ells v. Tousley*, 1 Paige 280. There will be a decree for the complainant. From the sale there will be excepted, of course, the land released by the savings institution and the land conveyed by the complainant to Arthur O'Keefe.

THE HOLMDEL AND KEYPORT TURNPIKE COMPANY

v.

WILLIAM W. CONOVER et al.

Lands were bought and paid for by a corporation, but the deed, by mistake, was drawn in the individual name of its treasurer, as grantee. The corporation, however, openly used and occupied the premises thereafter.—*Held*, that personal judgments against the treasurer were not liens on the premises, and that the corporation was entitled to relief against the purchaser at sheriff's sale, under such judgments, notice of the corporation's rights having been given at the sale, and that the corporation was not estopped by bidding at such sale.

Holmdel Co. v. Conover.

Bill for relief. On final hearing on pleadings and proofs.

Mr. C. Robbins, for complainant.

Mr. J. S. Applegate, for defendant Conover.'

THE CHANCELLOR.

This suit is brought by the Holmdel and Keyport Turnpike Company to establish its right as against the defendant William W. Conover to a small house and lot in Monmouth county, owned by it, but the title to which was taken in the name of George Schanck, who, at the time, was its treasurer. The property was bought by the company in 1873, of Eleanor Poling, for \$650, and the purchase-money was paid by it. The premises are situated about forty or fifty yards from the company's toll-gate at Mechanicsville, and were purchased for the use of its toll-gatherer there. The conveyance was taken in the name of Schanck, because the president of the company, by whom the business of the purchase was conducted in behalf of the company, was advised by the scrivener by whom the deed was drawn (but for what reason does not appear), that it could not be taken by the company itself, but must be taken by some one in trust for it. It was supposed by the company and Schanck that the deed was so drawn as to express the trust, but it was not. The fact was not discovered, however, until 1879, when it was found that the property was advertised for sale under executions issued on judgments against Schanck, and thus they were, for the first time, made aware of the fact that the deed expressed no trust. One of the judgments was recovered by Maria L. Conover, in 1879, and the other by John S. Hubbard, in 1877. The first-mentioned judgment was assigned to the defendant William W. Conover, and Samuel T. Hendrickson. Under the advertisement, it was sold by the sheriff to William W. Conover, in January, 1880, and was conveyed by that officer to him accordingly, in February following. The company, from the time of the conveyance to Schanck, was in open and notorious possession of the property until the time when it was sold by

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the sheriff. Before the day of sale, notice was given to Conover that the property did not belong to Schanck, but to the company; and at the sale, and before any bid was made upon it, explicit notice to the same effect was given to all present, including Conover, who admits that he heard the statement. The company, in order to avoid the trouble and expense of legal proceedings to protect its rights, bid upon the property at the sale. Its last bid was \$150. Conover bid \$5 more, and the property was struck off to him at \$155. By his answer, Conover sets up in his defence that he bid upon and purchased the property because he was interested as a judgment creditor of Schanck, under the Maria L. Conover judgment. But it is established by the proof that that judgment had been satisfied by the proceeds of a former sale, made in 1879, of some of Schanck's property, under it, at which enough was realized not only to satisfy that judgment, but to pay a large part of the Hubbard judgment. In the spring and summer of 1879, Conover received from the sheriff payment in full for the amount of his judgment. He now says, however, that he was interested in a different way in the sale of the property in question—that he had bought property at the previous sale, which was subject to a mortgage given by Schanck as collateral security for the payment of the claim on which the Hubbard judgment was founded. Without discussing this new defence, which has no merits, it is enough to say that he will be held and confined to the defence set up in his answer. *Chandler v. Herrick*, 3 Stock. 497; *Mead v. Coombs*, 11 C. E. Gr. 173. There is no claim that Hubbard had any equity under which Conover, as a purchaser under the judgment of the former, acquired any right against the company, under the circumstances. The lien of a judgment may be removed or displaced by the decree of this court, where the judgment debtor holds the legal estate merely as naked trustee for another, or where there is a subsisting equitable claim against the premises, which is prior, in point of time, to the lien of the judgment. *Morris v. Mowatt*, 2 Paige 586. If a purchaser under the judgment has notice of the equitable title at any time before his purchase and the actual payment of the money at the

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sheriff's sale, he cannot protect himself as a *bona fide* purchaser. *Ells v. Tousley*, 1 Paige 280. The trust, a resulting one, is established, and the fact that Conover purchased with full notice of it is not only proved, but is admitted. Nor is the company estopped by the fact that it bid upon the property. It did so after having given notice of its claim to be the equitable owner of the property. The notice given was that the property was not the property of Schanck, but of the company, and that it was purchased with the company's money, and had always, since the purchase, been in the possession of the company. Under such circumstances, no estoppel arises from its bidding. There will be a decree in favor of the complainants, with costs.

DAVID TERHUNE

v.

THE BANK OF BERGEN COUNTY.

On Tuesday, November 9th, 1880, the directors of a bank discovered that the cashier had embezzled the funds, but not to such an extent, as they then supposed, as to render the bank insolvent, and the bank continued business. On Wednesday, the complainant, a dealer with the bank, deposited about \$600 in cash and checks, which were credited in his bank-book, and the checks duly forwarded for collection, and credited to the bank by its correspondent. On Thursday, the bank suspended through insolvency.—*Held*, that complainant's deposit was not entitled to preference in payment over those of other depositors.

Petition that receiver pay the petitioner the amount of a deposit of cash and checks made by him in the bank on the day before its failure.

Mr. L. Shafer, for the petitioner.

Mr. G. Collins, for the receiver.

Terhune v. Bank of Bergen Co.

THE CHANCELLOR.

The Bank of Bergen County closed its doors on Thursday, November 11th, 1880, at a little before one P. M. The petitioner, John Haywood, had on deposit in the bank, on the day preceding, about \$1,800, and on the last-mentioned day, which was Wednesday, the 10th, he deposited \$50 in cash, and checks of various persons on different banks: one in Jersey City, others in the city of New York, and one in Livingston county, in the state of New York, to the amount, altogether, of \$593.54. His account was credited with the amount of cash and checks as so much cash deposited by him. The checks were forwarded the same day by mail, by the bank, to the Chatham National Bank, in the city of New York, for collection, and they appear to have been credited by the latter bank to the former, when received, which was on the next day, Thursday. On that day, those which were on banks in New York city, were paid at the clearing-house, probably at about a quarter after one P. M. The Bergen County Bank closed its doors at a little before one on that day. On proceedings in insolvency against it, a receiver was subsequently appointed. Mr. Haywood insists that the receiver should be directed to pay him the amount of the cash and of those of the checks deposited on Wednesday which were collected by the Chatham bank. Payment of two of the checks, small ones, was stopped by the drawer thereof, so that the amount thereof was not collected. He grounds his claim on the imputation of fraud, insisting that the Bank of Bergen County was insolvent on Wednesday, the day when the deposit was made, and that the president and directors of the bank ought to have known it, if they did not; and that, in justice to persons who dealt with and confided in it, they should have closed its doors on Tuesday, for on that day they discovered that the cashier had embezzled its funds to a very large amount. It appears, however, that they did not, in fact, ascertain that the assets of the bank were so greatly reduced by the fraudulent misconduct of the cashier as to threaten its insolvency, until after the close of business on Wednesday. The bank had a capital of \$100,000, and a surplus of about \$2,000. They were

McFarlan v. Morris Canal and Banking Co.

guilty of no fraud. The case of *Chaffee v. Fort*, 2 *Lana*. 81, is cited by the petitioner's counsel in support of his position. In that case it was held that when a banker receives funds on deposit, knowing at the time that he is insolvent, and about to fail, his assignee, under an assignment for the benefit of his creditors, obtains no title to the deposit. Here, however, it not only does not appear that the president and directors knew on Wednesday that the bank was insolvent, but, on the other hand, it appears that they then believed it to be entirely solvent. The petitioner is not entitled to the order which he seeks, either in regard to the cash or the checks. He endorsed the latter to the bank absolutely. It sent them away for collection on its own account, the same day, and they were collected accordingly by its agent and correspondent. The question is not whether the petitioner can claim the proceeds of the checks at the hands of the correspondent, but whether he is entitled to preference over other creditors of the bank in payment out of its assets. They will be required to accept a dividend. He asks that he may be paid in full. He is not entitled to it. He is merely a general creditor of the bank for the amount due him on account of his deposits. *Matter of the Franklin Bank*, 1 *Paige* 249; *Buller v. Sprague*, 66 *N. Y.* 392. The petition will be dismissed.

HENRY MCFARLAN

v.

THE MORRIS CANAL AND BANKING COMPANY et al.

The defendants filed a bill to restrain complainant from interfering with the height of a certain dam, whereupon complainant instituted a counter-suit to compel defendants to reduce its height. By a decision, rendered in 1879, in defendants' suit, their claim was upheld, and the complainant relegated to law for redress. On motion to dismiss complainant's suit for non-prosecution—*Held*,

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(1) That the suit can not be retained for the purpose of compelling defendants to pay the damages which complainant may hereafter recover at law, in case they refuse to pay such damages, because the bill neither asks for nor is adapted to such relief.

(2) That the claim that the dismissal of complainant's suit ought to be made without the payment of costs, on the ground of the novelty of the decision in the defendants' suit, can not be allowed, that decision having been, in fact, based on a long-established construction of defendants' charter.

Bill for relief. Motion to dismiss bill for want of prosecution.

Mr. T. N. McCarter, for the motion.

Mr. H. C. Pitney, *contra*.

THE CHANCELLOR.

The defendants filed their bill to restrain the complainant from interfering with a dam on the Rockaway river, which they claimed the right to maintain at its then height. The complainant subsequently began this, a counter-suit, in this court, to compel a reduction in the height of the dam. His bill was demurred to, and was afterwards amended. The amended bill was filed December 4th, 1878. The defendants' answer was filed February 3d, 1879. Since that time, no step has been taken in the suit. The defendants now move to dismiss the bill for non-prosecution. The decision of the first-mentioned suit, which was rendered in 1879, established the right of the defendants in this suit to the relief which they sought. *Lehigh Valley R. R. Co. v. McFarlan*, 4 *Stew. Eq.* 706. It was adjudged that the dam was a lawful structure, and that the complainant must seek redress by action. That decision was, of course, fatal to this suit. The motion to dismiss is resisted, however, on the ground that the bill should be retained, to await the result of litigation at law, to establish the complainant's claim to damages from the raising of the dam, to the end that if such damages, when recovered, be not paid, this court may, by means of this suit, aid the complainant by compelling payment. Not only has the bill no such aspect, but it has, in effect, been, by the before-

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mentioned decision, adjudged to be entirely without foundation. It has been decreed that the action of the defendant, of which it complained, was lawful, and that no relief can be granted upon the bill, and that the complainant must look for redress on wholly different grounds, and in another forum. To render the bill available for the purpose suggested, it must not only be remodeled, but recast to such an extent as to make it, to all intents and purposes, a new bill. Neither the necessity for holding it for the purpose suggested, nor the propriety of doing so, is apparent. It is further insisted that if the bill be dismissed, it should, under the circumstances, be without costs. This claim is founded on the proposition that the decision before mentioned was based on a new exposition of the law governing the subject. But, in fact, it was founded not on a new, but on a long-established construction of the charter of the Morris Canal and Banking Company. The bill will be dismissed, with costs.

JULIA FOSTER

v.

THE UNION NATIONAL BANK OF RAHWAY et al.

After a decree in foreclosure had been obtained and execution placed in the sheriff's hands, the owner of the equity of redemption in all of the premises, except a small parcel, tendered to the holder of the mortgages, and also to the sheriff, the amount due thereon, which was refused.—*Held*, that the fact that there was error in the decree constituted no ground for refusing the tender, and the sheriff was directed to accept, in satisfaction of the mortgages under the execution, the amount due at the time of the tender.

On petition and depositions. Motion that the sheriff be directed to receive money tendered in payment of certain mortgage claims, which, according to the exigency of the execution

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(for sale of mortgaged premises), are to be raised under that writ.

Mr. T. N. McCarter, for the motion.

Mr. B. Williamson, *contra*.

THE CHANCELLOR.

The decree in this cause was made January 25th, 1878. Subsequently, and prior to the 28th of October following, John Kean obtained an assignment of the complainant's mortgage and the mortgage of Elizabeth A. Forbes, which were the second and third mortgages, the mortgage of Theron R. Strong being the first. The bank held the other two mortgages, the fourth and fifth. The mortgages were all on the same property, a tract of seventy acres, of which a part (two and eight-hundredths acres) was, after the giving of the mortgages, taken by the Perth Amboy and Woodbridge Railroad Company, afterwards merged in and consolidated with the Central Railroad Company of New Jersey. Mr. Kean held, as he still does, the assignments for the benefit of the latter company. The bank, in 1877, under a foreclosure against the mortgagor (to which neither the prior mortgagees nor the railroad company were parties), begun before this suit was commenced, obtained title to all the mortgaged premises, except the part taken by the railroad company. On the 28th of October, 1878, the bank tendered to Mr. Kean the amount due, under the execution in this suit, on his two mortgages, with costs and interest, but he refused to receive the money. The next day, it made the same tender (with like tender as to the Strong mortgage) to the sheriff, who held the execution, and he also refused to receive the money. It has held the money ready ever since, to pay to Mr. Kean, or the sheriff, in extinguishment of the mortgages held by the former. The petition asks that the sheriff may be required to receive the money so tendered in satisfaction of the execution, as to those mortgages. The tender to the sheriff was not accompanied by any condition whatever. The object of the bank was to pay off

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those claims. It was the owner of the equity of redemption of all the land except the part taken by the railroad company. As such, it clearly had a right to pay off the claims against the property under the decree and execution. The sheriff appears to have refused to receive the money for the Kean mortgages, because he was directed by those interested in them not to take it. It is urged, on behalf of the railroad company, that the bank, under the circumstances, had no right of redemption, and that its object in paying the mortgages was to obtain subrogation to the rights of Mr. Kean and sell the mortgaged premises under the execution, and so, seeing that the decree and execution were erroneous, obtain an unjust advantage over the railroad company. The decree declared that because of the foreclosure sale before mentioned, the bank's mortgages were a lien only on the part of the property taken by the railroad company, and ordered that the whole of the premises, except that land, be sold to pay the first three mortgages, and if it should not be sufficient for the purpose, that the railroad land should be sold to pay the deficiency; and it also ordered that the latter land should be sold to pay the bank's mortgages. The decree was clearly erroneous, and it has been recently amended so as to provide for the sale of all the land, except the part taken by the railroad company, to pay all the mortgages, and then the latter land, if necessary, to pay any deficiency. *Foster v. Union Bank*, 7 Stew. Eq. 48. But the offer of the bank was to pay off the Kean mortgages, and the president of the bank, who made the tender, swears that the object was to cancel them and free the land from the encumbrance thereof. He further testifies that about a month previous to the tender, the bank had, by written contract, agreed to sell the part of the land to which it had obtained title under its foreclosure, to a person whom he names, for \$14,000, and that the object was to clear the property of the mortgages, with a view to that sale. In the next place, if subrogation had been sought, the decree would have been just as liable to correction, at the instance of the railroad company, for its protection, after such payment as before. The bank has held the money ready to make the payment ever since the tender, and, by its petition, declares its

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readiness to pay it over, and asks that the sheriff may be ordered to receive it. That prayer will be granted, and the sheriff will be ordered to accept, in satisfaction of the amount due on the Kean mortgages under the execution, the amount which was due at the time of the tender.

WILLIAM C. MILLER

v.

IRA M. HARRISON, administrator &c.

On November 22d, 1875, an administrator gave the usual notice to bar creditors in nine months, but the order thereon was not taken until May 29th, 1877. The complainant and two other creditors exhibited their claims within the nine months specified, and all the other creditors, except two, before the order was taken. The estate proving insolvent, the administrator, under the advice of the surrogate and also of his counsel, proceeded, with a view to saving trouble and expense, to settle the estate as if it were solvent, that is, by paying to each creditor his *pro rata* share of the assets, and settled the estate accordingly. The complainant, on receiving his dividend, gave the defendant a receipt in full for his claim against the estate. Both the administrator and the complainant were, at that time, ignorant that the latter had, by presenting his claim within the nine months, obtained a preference as to payment over some of the other creditors.—*Held*, that complainant, who did not assert the priority of his claim, allowed the administrator to pay all the creditors without a protest, and accepted his own dividend, and voluntarily gave the administrator a receipt in full for his claim against the estate, was not, under the circumstances, entitled to relief in equity.

Bill for relief. On final hearing on pleadings and proofs.

Mr. James O. Clark, for complainant.

Mr. J. W. Taylor, for defendant.

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THE CHANCELLOR.

The bill is filed by a creditor of the estate of John C. Johnson, late of Newark, deceased, against the administrator, to bring into this court, from the Essex orphans court, where they are pending, the accounts of the latter for settlement here, to the end that the complainant may be relieved from the effect of a receipt given by him to the defendant. That instrument, though purporting to be in full of his claim against the estate, was given on the receipt of only part of the amount due on the claim. The ground of relief is that the complainant accepted the dividend in ignorance, through concealment thereof from him by the defendant of his rights, which he insists entitled him to payment in full; and he claims that the defendant is therefore answerable to him for the balance of his debt. The claim, as proved June 19th, 1876, was \$10,000. It was subsequently reduced by a payment of \$3,300 which the complainant obtained from the estate out of the assets of the intestate's firm in New York. The amount of the dividend paid was on the whole claim, as proved, and was \$4,094.40. The complainant complains that the defendant concealed from him the fact that the complainant was (as he claims to have been) entitled, with two other creditors, to preference over the rest of the creditors because they three alone had exhibited their claims, under oath, within the time designated in the order for limiting creditors, which the defendant had taken and published; and that the defendant, ignoring and keeping silence as to the advantage which the complainant had thus obtained, distributed the estate, which was sufficient to pay the three (but not all the creditors) in full, among all the creditors, and thus gave to those who had not come in within the limited period participation in the assets to which they were not by law entitled; and, on the other hand, paid to the complainant only part, instead of the whole of his claim, thus depriving him of the preference which he insists he had gained by his diligence. The intestate died on November 17th, 1875. Administration was granted to the defendant on the 22d of that month, and an order limiting creditors to nine months was taken on that day. The inventory was filed on August 5th, 1876. The

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limited period expired on August 22d, 1876. A rule to show cause why the decedent's land should not be sold to pay debts was taken January 2d, 1877, and an order to sell was made in March following. The land was sold and the sale was confirmed on May 29th, 1877. On that day the administrator made a representation that the estate was insolvent, and a decree barring the creditors who had not come in within the nine months was made on the same day. From that time until the filing of the administrator's final account, no proceedings were taken in the orphans court, but the defendant distributed the estate among all the creditors, paying them a dividend of forty and ninety-hundredths per cent. of their claims. He afterwards filed his final account on December 30th, 1878. The complainant, who had received the dividend and given the defendant a receipt in full for his claim against the estate, filed exceptions, which were referred to a master in chancery on April 2d, 1879, and testimony was taken thereon, but further proceedings in the orphans court were stayed by the injunction of this court, issued on the filing of the bill. It appears that in the outset, and for perhaps the first six months of his administration, the defendant supposed that the estate would prove sufficient to pay all the creditors in full, but he soon afterwards found that it was not only insolvent, but would need care and management to make it pay any considerable dividend. The order to limit was applied for and taken on the suggestion of the surrogate that it was a proper and customary proceeding, and not in view of supposed insolvency. It was obtained on the same day on which the letters of administration were granted. No order barring creditors, however, was taken until May 29th, 1877, when the representation of insolvency was made. That order, then, was not taken until more than nine months after the expiration of the time limited for bringing in claims. The complainant and two other creditors exhibited their claims, under oath, within the time designated in the order limiting creditors. Afterwards, and before the order barring creditors was made, other creditors exhibited their claims, under oath, to the amount of about \$25,000. The claims exhibited within the period designated in the order limiting

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creditors, amounted to about \$33,500, but they were subsequently reduced to about \$23,000. The amount realized from the personal and real estate appears to have been about \$37,400. In addition to the debts which were proved, there were others to a very large amount, believed to be genuine and correct, which the administrator therefore allowed. The undertaker's bill was among these. The estate was only sufficient to pay a dividend of forty and ninety-hundredths per cent. upon all the debts. After the representation of insolvency had been made, the surrogate suggested to the administrator, with a view to saving trouble and expense, the propriety of settling the estate in the same manner in which he would if it were solvent; that is, by agreeing with the creditors as to the amount of their dividend, and paying it without proceedings in court to establish it. The administrator, approving of the suggestion, and being advised by his counsel that it was safe to do so, acted upon it. Afterwards, and in the summer of 1878, an impediment having been thrown in the way of the settlement of the estate by an attachment or injunction, by which the payment to the defendant of a large amount of money coming to the estate out of the decedent's business partnership in the city of New York, was stopped, the complainant called a meeting of the creditors at the Pacific Bank in that city, and some of the creditors met there accordingly. The result of the meeting was an endeavor to get rid of the obstruction before mentioned, which was successful. The defendant and complainant were both present at the meeting. The former stated there that he could not tell definitely what the estate would pay, but that he thought it would pay from forty to fifty per cent. No question was asked of him, nor was anything said, so far as appears, as to the time when the claims were presented, and the defendant made no representation or statement on the subject. Indeed, there is no room to doubt that he supposed that all the *bona fide* creditors were entitled to participate ratably in the distribution of the assets, without reference to the time or manner of exhibiting their claims, and whether they exhibited them or not, so long as their claims were known to the administrator. After the restraint by legal proceedings in New

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York, before mentioned, had been removed, he proceeded to the distribution of the assets among all the creditors, and paid the complainant his ratable proportion (and more than that, in view of what he had received in New York) on such division, part of it, \$2,500, before, and the residue at the time of signing the receipt. The receipt, with the check for the residue of the dividend, was left for convenience, by the defendant, with Mr. Farrington, the decedent's late partner, at the office of the firm, in New York, where the complainant lived; the check to be delivered on the signing of the receipt. The complainant at first refused to accept the check and sign the receipt, on the ground that he thought that the estate should have proved sufficient to pay the debts in full, and he suspected that there had been mismanagement of the assets. Mr. Farrington urged him (not, however, by any means at the instance of the defendant in any way) to accept the check and sign the receipt, suggesting to him that if it should prove that there had been any fraud, or the estate ought to have paid more, he could obtain relief, notwithstanding the instrument acknowledged the receipt of the money "in full for his claim against the estate." The complainant then took the check and signed and delivered the receipt. He states the transaction as follows:

"Mr. Farrington represented to me that that was my dividend out of the estate; that that was what it could pay; I at first refused to sign the receipt, because it was a receipt in full, and I thought the estate could pay more; Mr. Farrington said if I could prove that the estate could pay more, I would not lose my standing in court—it would not debar me from coming into court; he said that the receipt in full was not binding upon me if the estate could pay more, or there was fraud; when I signed the receipt, I did not know that I had obtained a preference above the other creditors of the estate, as I have since been advised by my counsel [that I had]."

The defendant neither saw nor communicated personally with the complainant, after he left the check and receipt with Mr. Farrington, until after the latter was signed, and in nowise urged or induced him to sign it. Indeed, it appears that he sought at one time to withdraw the check, because he was dissatisfied with the action of the complainant in obtaining satis-

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faction of \$3,300 of his claim, as before mentioned, out of the assets of the estate in New York, and it was merely by persuasion of Farrington, who was anxious to have the matter settled, that he was induced to leave it. Though Farrington urged the complainant, as before stated, to accept the check and sign the receipt, it was not by procurement of the defendant, nor as his agent, nor in his interest. Farrington gives the reason himself. He says that he did it in the interest of peace, and to end the matter.

The complainant seeks to set aside the receipt, to the end that, being relieved from it, he may compel the defendant to pay him the balance of his debt. He does not deny that he accepted the dividend and signed the receipt voluntarily, but bases his claim to relief on the ground that the defendant, as administrator, was his trustee, and was therefore in equity bound to acquaint him with the fact that he had obtained the preference which he now claims. Not only did the complainant voluntarily sign the receipt, but there is no charge of intentional fraud or concealment. Neither of the parties was aware that the complainant could claim such preference. The defendant appears to have managed the estate to the best advantage, having even advanced large amounts of his own funds, and incurred large personal liabilities, in his efforts to realize as much as possible for the creditors. He claims, and it seems justly, that his prudent and skillful management gained for the estate over \$30,000. The distribution which he made was an equitable one. He paid to each of the *bona fide* creditors his just proportion of the assets, except that the complainant received more than his share. One of the creditors whose claim was not put in within the time fixed in the order to limit, was the estate of Benjamin B. Ludlam, deceased. It had a claim of over \$23,000. Mr. Ludlam died in France, leaving two wills, but had no representative under either of them to exhibit the claim within the period fixed in the order. Another of the claims was the undertaker's bill of \$459.50, which was not proved at all, but as to which, it should be added, the complainant waives all objection. If the complainant indeed had obtained the advantage which he

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claims, it was a merely legal one, an advantage which he, of course, might have waived, and from enforcing which he might have been estopped in equity. If he had that advantage, the presumption that he knew it is quite as strong as the presumption that the defendant knew it; and if he consented that the defendant should distribute the estate by an equitable division among all the *bona fide* creditors, thus admitting others whose claims, apart from the legal advantage which he asserts, were as much entitled to payment as his, to a just participation in the distribution, he would, of course, in equity, be estopped from setting up his legal claim after the administrator had paid out all the estate in such distribution. He never made even an intimation that he had a preference until after the distribution had been made. He had abundant opportunity to assert his claim, and there was a good reason why he should have done so. At the meeting at the Pacific Bank there were present the representative of that bank, which subsequently received a dividend of \$1,510.63; the president and cashier of the Newark Bank, which afterwards received a dividend of \$3,039.76, and the representative of the Ludlam estate, to which was paid a dividend of \$9,438.20, and none of those claims were exhibited within the time designated in the order to limit creditors. He must have seen that it was proposed to make distribution to them, but he made no objection, and permitted the defendant to pay to them, out of the assets, nearly \$14,000, as their share of them, without any objection whatever. The complainant testifies that he did not know he had the advantage which he claims until afterwards, and after the distribution had been made, and not then until his counsel informed him of the fact. His hesitation in signing the receipt was not on account of his supposition or suspicion that he had a preference, but because he thought the estate ought to pay a larger dividend to all the creditors. His action in signing the receipt was purely voluntary. He relied on no assurance, representation or statement of the defendant in doing so. The defendant held out no inducement whatever to him to do it. In the absence of fraud, and even of knowledge, on the part of the defendant, the complainant is not, under the

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circumstances, entitled to relief against the receipt. Fair dealing between him and the defendant and the other creditors over whom he claims preference, required him to assert or give notice of his claim when he saw that the defendant, in ignorance of it, proposed to pay a dividend to those other creditors. His excuse for not doing so is that he did not know that he was entitled to it. Neither did the defendant. While an administrator would not, in the absence of conduct amounting to equitable estoppel, be protected in ignoring the rights of a creditor who has obtained a preference, he is, nevertheless, in the absence of fraud, not bound to communicate to such creditor the fact that he has obtained it. The administrator is generally, indeed, presumed to know and bound to regard the fact of the preference, and ignorance alone will not excuse him for disregarding it. He will not, as before stated, be protected in disregarding it, though ignorant of it, in fact, unless the circumstances are such that equity should aid and protect him. On the other hand, the creditor is bound to know for himself the existence of his right to preference, and if he fails to assert it, to the prejudice of the administrator, under circumstances which would amount to equitable estoppel, equity will not aid him against the administrator. Where, as in this case, both parties were ignorant of the existence of the right and acted accordingly, and it would be inequitable to accord to the creditor relief against the administrator, it will, of course, be denied.

But, further, it does not appear that the complainant had, in fact, obtained the advantage which he claims. The order to limit creditors was taken on November 22d, 1875. The nine months therein designated as the time within which claims were to be brought in, expired on August 22d, 1876. But no order barring creditors was made until the representation of insolvency was made, which was not till May 29th, 1877. All the claims which were put in under oath, were so exhibited in the year 1876, before the order barring creditors was made, except that of the estate of Benjamin B. Ludlam, deceased, which was not put in under oath until 1878. I regard it as the law that, since the revision of the orphans court act (March 27th, 1874), notwithstanding

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the making and publishing of an order to limit creditors and the expiration of the limited period, it is not too late to put in a claim, provided the order barring creditors has not been made. *Ryder v. Wilson's Exr.*, 12 Vr. 9; *Terhune v. White*, 7 Stev. Eq. 48. Before the revision, the law provided that the creditor failing to exhibit his claim within the time designated by the rule to limit, should, after due notice of the rule had been given, be barred, except as to estate not inventoried or accounted for. *Nix. Dig.* 653. Proof of the rule and notice, and failure to exhibit, constituted a bar. *Ryan v. Flanagan*, 9 Vr. 161. It also provided that the orphans court might, on proof that notice had been duly given, make a final decree barring such creditors as had not exhibited their claims within the limited time, and that such decree should be conclusive as a bar. *Nix. Dig.* 308. But by the revision it is provided (*Rev.* 764) that after the expiration of the time limited in the order, the orphans court, upon proof that the notice has been duly published, may, by final decree, order that all creditors who have not brought in their claims within the time fixed in the order, shall be barred from any action therefor against the executor or administrator; and it is also provided that any creditor who shall have neglected so to bring in his debt, demand or claim within the time so limited, shall, by such decree, be barred of his action therefor against the executor or administrator, except as to property he may find which is not accounted for. The act does not provide, as it did before revision, that the mere failure of the creditor to put in his claim shall bar him, but that the decree shall constitute the bar. The effect is practically to extend the time for exhibiting claims until the decree shall be taken. The complainant had not, in fact, any advantage over those creditors who put in their claims prior to the making of the order barring creditors. And though that order, by its terms, barred all who did not exhibit their claims within the nine months, if the law is as above stated, it was erroneous, and should, by its terms, have barred none except such as had not put in their claims before it was made.

The bill will be dismissed, with costs.

Citizens Building Association v. Coriell.

THE CITIZENS BUILDING, LOAN AND SAVINGS ASSOCIATION
OF PLAINFIELD

v.

WILLIAM McD. CORIELL et al.

The managers of a building and loan association are not personally liable for losses resulting from an honest mistake in estimating the value of stockholders' lands on which they loaned money, nor for a defect in the acknowledgment of a mortgage, which rendered it worthless. But they are liable for losses from loans made on personal security of the stockholders, in violation of a by-law limiting the amount of such loans.

Bill for relief. On final hearing on pleadings and proofs.*Mr. J. J. Bergen* and *Mr. H. M. Gaston*, for complainants.*Mr. J. Henry Stone* and *Mr. E. W. Runyon*, for defendants.

THE CHANCELLOR.

The bill is filed by the Citizens Building, Loan and Savings Association of Plainfield, a corporation created under the act "to encourage the establishment of mutual loan and building associations," against nine persons and the executors of another, to establish and enforce the liability of the defendants to indemnify the complainant for alleged breaches of trust of the nine and the decedent while acting as directors of the complainant for the years 1874, 1875, 1876 and 1877. In 1878, they resigned and ceased to be directors. The specific charges of the bill are that the directors invested the moneys of the association on insufficient securities in eight instances, whereby loss has been sustained by it, and that they neglected, in one instance, to foreclose a mortgage when they should have done it, by which neglect, it is alleged, the association has sustained a loss through the deprecia-

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tion of the property. Of the investments complained of, four were on loans to Israel D. Ten Eyck, John Schorb, Randolph Dunham and Fanny N. Moore, respectively, upon the bonds of the borrowers, secured by mortgage of real property in the city of Plainfield, and the assignment of stock of the association owned by them respectively, as collateral security; another was on loan to Patrick Agney, upon his bond, secured by mortgage of real property in that city, and the other three were on loans to Martin Giles, David W. Rogers and W. L. Titsworth, respectively, upon bond and the assignment of stock in the association, and not secured by mortgage of real property. The first-mentioned four mortgages were in form such as is usual in such associations on loans to stockholders, and the Agney mortgage was of the ordinary sort, not payable as the others were, in monthly payments, but at a fixed time, with interest. The complaint in regard to the loan to Ten Eyck is that, in 1874, the directors lent to him \$3,800, on property on which there were already three mortgages, two for \$5,000 each and one held by the association for \$1,000—\$11,000 altogether—although, as the bill alleges, in 1873 they had refused to lend \$1,000 on the property, on the ground that the security was not satisfactory. And the complainants further complain, in regard to this transaction, that in December, 1877, the directors accepted a deed for the property to the association, by which it assumed the payment of all the encumbrances; and the bill alleges that the property will not, at a public sale, realize to the association more than enough to satisfy the encumbrances, other than the \$3,800, and that that sum is therefore lost to the association. As to the loan to Schorb, the complaint is that, in October, 1874, the directors lent to him \$1,600, and in November, 1875, \$1,000, taking for security eighth and ninth mortgages upon his property, on which there were already mortgage encumbrances to the amount of \$15,100, while the property was not then worth more than \$15,000; so that the association met a loss in the transaction, allowing for the value of the stock assigned as collateral security, to the amount of over \$1,500. As to the loan to Randolph Dunham, the bill states that the directors, in 1874, canceled a first mort-

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gage of \$2,000, which the association held on his property, accepting, in lieu thereof, a fourth mortgage for the same sum, on other property of his, already encumbered for \$8,000, whereby the association, allowing for the value of stock held as collateral security, lost about \$1,300; and it further states that, at the time of the exchange, Dunham was seven months in arrears in his payments of installments on his stock. The complaint with reference to the loan to Fanny N. Moore is, that the directors lent \$5,000 to her, on second mortgage of her property, already encumbered to the amount of \$2,500; that she was then in arrears in her payments on her stock; that the property was not worth over \$5,000 and that the first mortgage has been foreclosed and the property sold, and the association has lost about \$3,000 of the loan. As to the loan to Agney, it is alleged that it was made in 1876, and was of the sum of \$250, and on second mortgage of his property, on which the association had already a mortgage of \$1,000; that through the neglect of the directors in seeing to it that there were no encumbrances by way of mechanics' lien, on the property, when the \$1,000 loan was made, the loan of \$250 was rendered necessary to pay a claim for which such a lien existed, and that the property is not worth more than the amount of the first mortgage, and therefore the association will lose \$250 by the transaction. The bill states that the loan to Giles, who was one of the directors, was \$600, and was made in 1874, on his personal bond, with no mortgage security; that he was then in arrears upon his stock, and that the \$600 are lost. It states that the loan to Rogers, which was of \$1,000, and made in 1874, was made on the like security (but it is not alleged that he was then in arrears on his stock), and that the association has lost \$425 on that loan. As to the loan to Titaworth, which was of \$600, and made in 1876, the complaint is that it was made on like security, and that he was then indebted to the association in \$800, for which it held only such security, and it is alleged that the association has lost about \$930 on those two loans. The bill also charges upon the defendants neglect in not proceeding by foreclosure, in 1875, to collect the money due from Richard H. Hall on his mortgage for \$1,000,

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to the association, on his property at White House, whereby the association has suffered loss to the amount of \$508, in the depreciation of the property. The foregoing are all the specific charges of the bill. It waives answer on oath. The answer fully sets forth the transactions complained of, with a denial of all culpability on the part of the directors.

According to the evidence, the facts in regard to the loans in question are, briefly, as follows :

Upon the Ten Eyck property there were prior encumbrances to the amount of \$10,000. The loan of the association was \$3,800. The property was valued by the security committee of the board, at the time of making the loan (in 1875), at \$17,500, and the cash value of the stock which was assigned as collateral, was, according to the testimony on the part of the defendants, \$2,739.46; according to the testimony of the other side, \$2,665.07. So that there was a margin of security in the whole of about \$10,000 over the prior encumbrances on the property, to secure the payment of the loan of \$3,800 made by the association. In support of the valuation is the fact that the property cost Ten Eyck \$23,150. He bought it in 1872 or 1873, and gave \$15,150 for it, and he afterwards put improvements on it which cost him over \$8,000. Its rental value in 1875, when the loan in question was made, was from \$2,100 to \$2,150. Part of the premises was rented at \$1,500, and the rest was occupied by Ten Eyck himself, who swears that the rental value of the part he occupied was from \$600 to \$650. Many witnesses speak of the value of the property. Four of them are disinterested. Of those four, Mr. Bacon, a real estate dealer, estimates it at from \$21,000 to \$23,000. Mr. Cook, who sold the property to Ten Eyck, values it at from \$16,000 to \$17,000, and Mr. Vanderbeek at about \$16,000. The valuation of the committee was, it will be remembered, \$17,500. It should be stated that the fact that the loans were made on shares of stock held by the borrower, on which he was required to pay monthly installments applicable to the reduction of the principal of the loan as well as the payment of the interest, so that the loan was, in fact, if the installments were paid, reduced monthly by repayment of part of it,

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entered into the consideration of the security committee and the board in determining upon the sufficiency of the security, not only in this but in all cases of like loans. The allegation in the bill that in 1873 the board had refused to lend Ten Eyck \$1,000 on the security of the property, is not supported. A loan of that amount was awarded to him in 1873, which was not made, indeed, but it was not because the board deemed his property insufficient security, but because he did not then own the requisite stock to entitle him to the loan. He was adjudicated a bankrupt in 1877, and the board, of which the directors whom it is sought by this suit to inculcate were members, bought the property of his assignee for \$50, subject to the encumbrances, which were those before mentioned, but no others, which the association assumed. The property is still held by the association. Whether there will be a loss upon it, it is impossible to say positively.

The loan to Schorb was of \$2,600, on twenty shares of stock. The security committee valued the property at \$20,000. The cash value of the stock was \$1,328.30. The prior encumbrances were \$14,100, leaving a margin of security in the property itself of \$5,900 for the loan in question; to which is to be added the value of the stock, \$1,328.30; altogether, \$7,228.20. The bill states, however, that the property was not worth over \$15,000. Schorb swears it cost him, with the improvements, \$21,000; that he bought part of the land in 1868 and the rest in 1872, and built upon the property in 1874. Mr. Bacon says the property was worth from \$19,000 to \$20,000 in 1875. The loan was made in 1874. Of the prior encumbrances none were on the whole property. The property had a frontage of sixteen feet and six inches. \$2,500 of the encumbrances were on ten feet of it alone; \$6,500 on an adjoining strip of sixteen feet of it alone; \$600 on another strip of six feet front alone, and \$4,500 covered both of the two strips of ten and sixteen feet. One of the mortgages taken by the association was on those two strips, and the other was on the whole property. The strip of ten feet has been sold under foreclosure, and nothing was realized to the association; but the defendants insist that the complainants did not properly guard the interests of the association at the sale.

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Schorb, it should be stated, paid up his dues on his stock until November, 1877.

The exchange of mortgages made at the request of Randolph Dunham, was of a second mortgage of \$2,000 (not the first mortgage, as stated in the bill, there being a prior one of \$3,000), upon property of his, for a mortgage apparently fourth, but, as the defendants say, actually the third, on another property of his. The prior mortgages on the latter property were one of \$1,000, one of \$5,000, and another of \$2,000—\$8,000 altogether. The last-mentioned mortgage was held by Isaac Clawson, Dunham's father-in-law, who, the defendants say, agreed with the association, when the exchange was made, that its mortgage should have precedence over his. If so, the prior encumbrances were, in fact, only \$6,000. The association had, as collateral security, twenty shares of stock, worth then \$1,110.17, and the property was valued by the security committee at \$12,000; so that at that valuation there was security to the amount of over \$7,000 for the loan of \$2,000. Mr. Bacon says that the property was worth from \$11,000 to \$12,000 in 1875. The constitution expressly gave the directors power to make substitutions. A foreclosure of the mortgage for \$5,000 (the second mortgage), under proceedings begun after June, 1878, has taken place, and the property was bought at the sale for \$3,000 by the second mortgagee, who has sold it since for \$8,300. The Clawson mortgage was not put in under the foreclosure proceedings. The defendants insist that the interest of the complainant, under the foreclosure, was sacrificed by the neglect of the board, for the time being, to attend the sale and buy in or bid on the property. Dunham paid up all arrears when the exchange was made.

The loan to Fanny N. Moore was of \$5,000, and was made upon property valued by the security committee at \$7,000, with twenty shares of stock as collateral security. There was a prior mortgage of \$2,400 on the property. Her stock was then worth \$2,534.60. So that, at a valuation of \$7,000 for the property, there was a margin of security of about \$7,000, including the value of the stock, over the amount of the first mortgage. The borrower was not in arrears when the loan was made.

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Mr. Bacon says the property was worth in 1875 (the loan was made in 1874) from \$7,000 to \$8,000. It has been sold under foreclosure and nothing was realized for the association, but the defendants insist that if there is a loss it is because the property was not bought in for the association, or because of depreciation in value for which they are not responsible.

The loan of \$250 to Agney was made to enable him to pay a claim for lumber furnished him for building the extension to the house on his property on which the complainants already had a mortgage of \$1,000. For the claim a mechanics' lien could have been established. The property was valued by the security committee at \$1,200, and the cash value of his stock was then \$504.65, altogether \$1,704.65, while the two mortgages (there was no prior encumbrance) amounted to but \$1,250. The property has not been sold, and the defendants deny that there need be any loss on it. Agney continued to pay his dues on his stock until after June, 1878.

The Hall mortgage, in respect to which neglect in not foreclosing in 1875 is charged, was taken in 1870. There is no suggestion of culpability or liability for the investment. The mortgage in 1875 was placed in the hands of the solicitor for foreclosure, and would have been proceeded upon but for the fact that Hall induced the board to refrain on his promise to resume payment of his dues, which promise he kept and paid them up to October, 1877, when proceedings for foreclosure were taken, which were stopped subsequently and after June, 1878.

The loans to Giles, Rogers and Titsworth on personal bonds and assignments of stock as collateral security, were made when the borrowers were in good financial standing and were not in arrears with the association. The loan to Giles was of \$600, and was made in November, 1874. His stock was worth \$326.02 at that time, and he continued to pay his dues up to October 20th, 1875, but paid nothing afterwards. His stock was then worth \$376.79. He subsequently became insolvent. The loan to Rogers was made under like circumstances and on like security.

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It was of \$1,000, and was made in April, 1874, on his bond and five shares of stock, worth then \$676.70. He was not in arrears, and continued to pay his dues till June, 1876. The loans to Titsworth were two, one in 1874 for \$800, and the other in 1876 for \$600, and were made on his bond with Joseph D. Spicer as surety, and ten shares of stock, worth in 1876 \$744, as collateral. The defendants say that Spicer was solvent until long after June, 1878, and that if there be a loss it is not chargeable to them.

As before stated, the bill contains no charges of misconduct in any matter except in making the investments specified and in neglecting to foreclose the Hall mortgage in 1875. Other charges of irregularities, loose methods &c. were made on the hearing, and the evidence, which is quite voluminous, is directed to them as well as to those mentioned in the bill, but they are not within the issue and must be left wholly out of consideration. The bill contains no imputation of intentional fraud, but its charges are of mismanagement, and, in the making of the loans, violation of the constitution and by-laws. There is no ground, either in the bill or in the evidence, for any charge of corrupt conduct or willful wrong. To consider the charges, and, first, as to the loans made on the security of real estate: the constitution of the association provides that whenever a stockholder shall be declared to be entitled to a loan or loans, he or she shall either pay, or allow to be deducted, the premium offered therefor, and, before receiving the loan, shall secure the payment thereof to the association, by a bond and mortgage, for the full amount of the sum loaned, and by the assignment of the policy of insurance, if required; and that for every loan of \$200 made to a stockholder, at least one share of stock shall be assigned to the association as collateral security. It will be observed that it does not provide that the security shall be by first mortgage; and, indeed, when the character, objects and methods of such associations are considered, such a provision would, undoubtedly, lead to serious embarrassment in their operations. It is intended that their borrowers shall be their stockholders. The borrowing stockholder is bound to repay (and, theoretically, will

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do so) the loan, in monthly installments, applicable to the payment of principal as well as interest, thus reducing the loan at every monthly payment. The law, too, permits him to contract, by valid, lawful, and therefore enforceable, agreement, to pay a large premium for his loan. This fact is not consistent with a requirement that the security shall be of the high character which is demanded for loans on which no premium is paid. In this association, the average of the premiums paid for loans, in 1868, was twenty-one and four-fifths per cent.; in 1869, twenty-two per cent.; in 1870, eighteen and two-thirds per cent.; in 1871, sixteen and one-eighth per cent.; and in 1872, fifteen and one-half per cent. At a meeting in 1874, there were nine loans sold. Three of them brought twenty-four per cent. premium; two, twenty-five; one, twenty-three, and three, twenty-one and one-half. It appears that over two-thirds of the stockholders of this association were borrowers. Again: a requirement that all investments should be on first mortgage would probably frustrate, to a very great extent, one of the chief purposes of the association—to aid persons of small means to obtain homes for themselves, by payment of the price in small installments, extending over a considerable period of time. The directors, undoubtedly, supposed that they were under no obligation to take only first mortgage security. Mr. Pope testifies that the practice of loaning on real estate, on which there were already encumbrances, commenced in February, 1868; that the first mortgage ever taken by the association was a second mortgage. But he swears, also, that only about one-quarter of the mortgages taken were not first mortgages. He also says that when money was lent to one who was not a stockholder, it was almost invariably on first mortgage. To hold directors personally responsible, under such circumstances, because they have taken poor mortgage security, though without intending to do so, but believing it was good, would be unreasonable. And here it may be remarked that the complainant alleges, in its bill, that the persons to whom the loans were made were in arrears, and the constitution prohibits loans to such persons. According to the evidence, they were not in arrears. If, when the loan was awarded, they

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were in arrears, but paid the arrears out of the loan, in the absence of bad faith, they would be regarded as not in arrears when the loan was made. These directors served without pay. They were selected by their fellow stockholders to manage gratuitously the affairs of the association in which they and the other stockholders were jointly interested. To apply to them the strict rules which are applicable to trustees who assume the discharge of the duties of private trusts, would be unjust. In the absence of fraud, and where they have neither derived, nor expected to derive, any profit, benefit or advantage from their management which was not common to the other stockholders; when they have acted fairly, and have not been guilty of gross neglect or gross inattention, they should not be held liable. The rule applicable to mandatories is sufficiently stringent for such cases, and is a reasonable one. They should be held liable only in case of fraud, gross negligence or misuser. *Overend & Gurney Co. v. Gibb, L. R. (5 H. of L.) 480*. It was so held in *Sperling's Appeal, 71 Pa. St. 1*. That was a case similar to this, and involving the same question of liability. It was there said that, while directors are personally responsible to the stockholders for any losses resulting from fraud, embezzlement or willful misconduct, or breach of trust, for their own benefit, and not for the benefit of the stockholders, for gross inattention and negligence, by which such fraud or misconduct has been perpetrated by agents, officers or co-directors, yet they are not liable for mistakes of judgment, even though they may be so gross as to appear absurd and ridiculous, provided they are honest, and are fairly within the scope of the powers and discretion confided to the managing body. In *Hodges v. New England Screw Company, 1 R. I. 312*, the court said that if the mistake (referring to the violation of the charter) be such as the directors might well make, notwithstanding the exercise of proper care, and if they acted in good faith and for the benefit of the company, they ought not to be held personally liable. In the case in hand, in the mortgage investments under consideration, there was no dishonesty of purpose, nor any gross neglect, nor gross want of attention. As before remarked, there is no imputation

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of fraud, nor any ground for such imputation, in any of the transactions. On the other hand, the directors appear to have acted with entire honesty. They were themselves owners of a considerable amount of the stock. There were two series of it. When they resigned, in 1878, they owned about one-seventh of the whole. There was no concealment of their transactions. There was a meeting of stockholders every month. In estimating the value of property which was proposed as security, they acted with reasonable care. They had a security committee of three of their number, all builders, and all well acquainted with the values of property—men chosen for their fitness for the work, and who seem to have discharged their duty with fidelity. The compensation of the members of that committee was not such as to affect their judgment in favor of the borrower. It was limited to one dollar for each member of the committee and his expenses, in each case to be paid by the borrower. The directors appear to have given due attention to the business of the association. In this connection, the charge of neglect, in reference to the Hall mortgage, may properly be disposed of. The neglect charged is in not proceeding to foreclose that mortgage in 1875. They delivered the mortgage to the solicitor for foreclosure, but, on Hall's agreeing to pay his dues (a promise which he kept for some time thereafter), they refrained from proceeding. In February, 1878, he paid his dues in full, up to October, 1877, but from that time he made no further payments. The constitution provided that if the interest on a loan was suffered to remain unpaid more than six months, the directors might compel payment of principal and interest by ordinary proceedings on the bond and mortgage, according to law. After the lapse of six months from October, 1877, the directors began foreclosure proceedings on Hall's mortgage, which were in progress when they resigned, in June, 1878. These proceedings were not continued, for the reason, it is alleged, that the mortgage proved to be materially defective, for want of acknowledgment by Hall's wife, in whom it is said the title of the property was. But the charge of neglect, in respect to the acknowledgment of the mortgage, is not made in the bill, and, if it had

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been, blame for the defect would not be imputable to the directors. They properly relied on the knowledge and attention of the solicitor for the legality of the mortgages. If he was derelict in his duty in that matter, and they were ignorant of it, they are not chargeable. It appears, however, by the minutes of the board, under date of October 8th, 1878, that the discontinuance was ordered on the ground that there was "no equity in the property" to warrant the suit. The Agney mortgage of \$250 may be further noticed in this connection. That was a mortgage of the ordinary kind, and the money was lent to protect the \$1,000 mortgage to the association then on the property. It is enough to say that, if the property is insufficient security, and the necessity for this loan arose from neglect, it was the neglect, not of the directors, but of the solicitor.

It is urged, however, that as to the loans to Giles, Rogers and Titsworth, on the security of bonds alone, with pledge of stock, the directors are without excuse; that, in making them, they acted *ultra vires*; that such security for loans was forbidden by the constitution. The constitution provides that loans to stockholders shall be secured by bond and mortgage (presumably of real property), and provision is made for loans to persons not stockholders of funds lying unproductive on "undoubted security" (without specifying the character of the security) for a period not exceeding three months. The loans complained of were made to stockholders. It is proved, however, that loans on such personal security, with pledge of stock, were made from the very beginning of the association in 1868. Mr. Pope, who was treasurer for ten years, up to 1878, testifies that it was the constant practice, commencing with the months of March, April and May, 1868, and continued down to 1878; that the custom was known by all members, and was no secret; that a majority of the members either borrowed on personal security, or knew that it was done; and that while those whose conduct is called in question in this suit were in office, such loans were made to the amount of about \$75,000, and nothing was lost on them while they were in office. The president of the board elected in 1878 (by the direction of which board this

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suit was brought), Mr. Harris, borrowed on such security in 1869, and Mr. Appleton, its secretary, borrowed on such security in 1871 and 1873. That such loans were not regarded as unlawful, appears from the testimony of Mr. Coward, the solicitor of the association. When asked whether he, as solicitor, advised the taking of personal bonds as security for loans beyond the value of the borrower's stock, he answers that he does not know that he advised it, but that he considered the propriety of it with the others. He was a director. He further says that he, himself, got a loan of \$1,000 on such security. It would seem, from Mr. Appleton's testimony, that such loans are still made, and are supposed to be legitimate, if not beyond the value of the stock pledged for payment. To the question whether the board of directors have, since June, 1878, made any loans to members on personal bonds without taking a mortgage as security, he answers :

"Only such as are provided for in the by-laws, where the stock assigned as collateral exceeds in value the loan made; I mean the withdrawal value."

On the 18th of December, 1878, as appears by the minutes, it was ordered by the new board that, for loans made on the stock, as collateral security, the treasurer should require, as security, a bond with the transfer of such number of shares of stock as, at the withdrawal value, should equal the face of the loan. It seems, then, that lending money to members on personal bond and pledge of stock, though it is in contravention of the constitution, has never been, and is not yet, regarded as *ultra vires*, but as an entirely legitimate transaction. As to the care taken in making them, up to 1878, Mr. Pope says that when they were made, the amount of other property besides stock which the borrower was possessed of, and his financial standing, generally, were taken into consideration, and that oftentimes (and such appears to have been the case in regard to the loans to Titsworth) another name on the bond would be required, and when a loan was made, on such security, to a member of the board, the terms were fixed by the lenders. The lending, on such security, appears to have been begun when the association started,

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and it was recommended by Mr. Webster, the first president, who said he had found it to work well in another association of which he had been the head, and which had been successful. Mr. Pope says that most of the board of 1880 (there were twelve in it) borrowed money of the association in that way, and it is not denied. Mr. Bachman, one of the board, who was a witness for the complainant, says that he has done so. Mr. Pope further says, and it is not denied, that no objection or protest was ever made to or against the practice. It seems, indeed, to have been fully acquiesced in. Mr. Pope further says that up to the time when those whose conduct is under scrutiny ceased to be directors, the whole number of stockholders was between three hundred and seventy-five and four hundred, and of those, about one hundred and twenty-five (or about one-third of the whole number) borrowed money in that way. But it appears, by the minutes, that on the 7th of March, 1870, a by-law was adopted, to the effect that loans made on the stock of the association should not exceed the amount paid in on the stock, and interest thereon at six per cent. per annum. It is quite clear that the defendants ought not to be held liable merely on the ground that in lending the money of the association on bonds and its stock, they were acting in violation of the constitution, and so exceeded their powers, provided they had observed the provisions of the by-laws on that head. The by-law itself is in violation of the constitution; but the practice, the by-law, the acquiescence, and also what was equivalent to the advice of counsel, would, under the circumstances, have excused them from the consequences of their mistake as to their powers. But the by-law of 1870 was in force when the loans to Giles, Rogers and Titsworth were made, and those loans were all made in contravention of it. Giles borrowed the money in November, 1874. He paid his dues up to October of the year following, and then ceased, because, as he says, he "got tired of paying." He afterwards says, however, that he ceased paying by reason of his financial embarrassment. He was a director, and it does not appear that any step was taken, from the time when he ceased paying to June, 1878, to compel him to pay. He says his embarrassments be-

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gan in the fall of 1875. He says he thought he was worth from \$8,000 to \$10,000 when he borrowed the money, but that since then he has been unfortunate in business. There is not only no evidence that the money due from him could have been collected since June, 1878, but the proof is to the contrary. He says that in July, 1878, he was worth nothing, and has been worth nothing since then. The responsibility for the loss cannot, then, be shifted to those who succeeded the directors by whom the loan was made. The board cannot be excused for lending the money to him in contravention of the by-laws. They cannot be excused for lending the money of the association to a stockholder on personal bond and stock, where the stock was of less value than the amount loaned. There was no warrant, as there is no justification, for their action. They would, under the circumstances, have been excused in lending a sum equal to the amount he had paid in on the stock which he pledged for its payment, and interest thereon, according to the by-law, but they have no excuse for lending beyond that on such security. They have not even any practice to plead. They lent \$600 to Giles, on his bond and stock worth then only \$326.02. The same observations apply to the loans to Rogers and Titsworth. To the former, they lent \$1,000 on stock worth only \$676.90, and to the latter, \$1,400 on stock worth only \$744. The defendants are liable to the company for the loss on those loans, because the directors must be held to have culpably exceeded their powers in making them. Nor can those loans be justified under the provision of the constitution authorizing loans for short periods, on undoubted security, of funds lying unproductive. Such loans are to be made to others than stockholders. The loans in question were made to stockholders, as such, on the security of their stock.

As to the other transactions, the loans on mortgage, enough has been already said to indicate the conclusion. Those loans were not made in contravention of any express provision of the constitution, and there is no evidence of any dishonesty of purpose, but the contrary. If there was error, it was an error of judgment merely. The results complained of, the losses which have been met or are

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apprehended, are to be attributed to excessive valuations honestly made, and the investment of money on security too slender, indeed, but at the time honestly deemed to be sufficient. The charge of neglect has already been distinctly disposed of. As before stated, the issue includes nothing but the eight loans and the alleged neglect to prosecute Hall. Therefore, all other matters have been left out of consideration. There will be a decree in favor of the complainants for the loss sustained on the Giles, Rogers and Titsworth loans, and the costs of this suit; and, inasmuch as there is no evidence of the non-participation of any of the defendants in the making of those loans, and no such defence was set up in the answer, or even presented at the hearing, the decree will be against all of the defendants.

WASHINGTON B. WILLIAMS, receiver &c.,

v.

PATRICK RILEY.

The treasurer of a savings bank, who was also one of its managers, assigned to the bank a bond and mortgage owned by him on lands not worth double the mortgage, as required by the bank's charter, and without submitting the investment to the finance committee for approval, as required by its by-laws.—*Held*, that he was liable for a loss sustained on such bond and mortgage, and that the fact that the managers did not object to or repudiate the transaction for six years, was no defence, whether his breach of duty was known or not known by the other managers.

Bill for relief. On final hearing on pleadings (original bill, answer and replication), and proofs and supplemental bill and general demurrer thereto.

Mr. W. B. Williams, in pro. pers.

Mr. P. Bentley, for defendant.

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THE CHANCELLOR:

This is a suit brought by the receiver of the Mechanics and Laborers Savings Bank (of Jersey City) against one of the managers, to compel him to indemnify the depositors and other creditors of the bank against the loss which it has sustained upon a bond and mortgage for \$3,000 assigned by him to the bank in May, 1873. At that time he was one of the managers, and was treasurer also. He continued to be treasurer until November, 1877, and was a manager down to the time when the bank was declared by this court to be insolvent, and a receiver appointed, which was in March, 1879. The mortgage was dated December 9th, 1869, and was payable in one year, with interest. No part of the principal was at any time paid, and none has been collected, except through the sale of the mortgaged premises in a suit for foreclosure brought by the bank in this court before the receiver was appointed. The foreclosure sale took place July 17th, 1879, after the appointment of the receiver. The property sold for \$1,000. After paying execution fees, there remained \$944.28, applicable to the amount due for principal and interest (\$3,614.28) on the mortgage, costs of suit (\$78.09), and money paid (\$17.60) for insurance premiums by the bank on the property—altogether, \$3,709.97. So that a balance of \$2,765.69 was due to the bank on the day of sale, and it still remains due, with interest from that time. For that sum (which is the amount of the loss sustained by the bank), with interest, the complainant asks a decree. The ground of his claim is that the transaction in question was a breach of duty, a violation of trust on the part of the defendant, for which he is bound to answer to those whom the receiver represents. By the charter of the bank (*P. L. of 1869 p. 179*), it is provided that the bank shall invest no money in any public stocks other than those specified, nor on bond and mortgage, except on real estate worth at least double the amount of the sum invested above all encumbrances, nor in the stock of any incorporated company whatever. The by-laws of the corporation provide (and did when the transaction under consideration took place) for the appointment of a finance committee of three managers, besides the president and vice-

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president, who were *ex officio* members, whose duty it was to attend to all applications for loans. They also provided that all checks should be drawn by the treasurer and countersigned by the president, or, in his absence, by the vice-president, and should be made payable to the person in whose favor they were given, and that no payment of over \$25 should be made, except by check. At the time of the transaction in question, there was a finance committee, but the propriety of making the investment was not submitted to it, and it never passed upon it.

That the investment was one which was forbidden by the charter, appears very clearly from the testimony of the defendant himself. The mortgaged premises were a house and lot in Jersey City. The defendant owned them on the 9th of December, 1869. On that day he conveyed them to the mortgagor, Christopher Conolly, for the consideration of \$5,000, of which \$2,000 were paid in cash, and the rest secured by the mortgage. The investment would not have been an allowable one under the charter, unless the premises were, at the time of making it, worth \$6,000, the mortgage being for \$3,000. It is quite manifest that they were not worth more than the price which the defendant got for them. He bought the lot in 1869 for \$1,200. He removed the house, which was then about nine or ten years' old, at least, from another place to the lot. He says it cost him between \$3,300 and \$3,500. The property, therefore, according to its cost, as he states it, was not worth over from \$4,500 to \$4,700 in 1869. He does not say what it was worth when he assigned the mortgage in 1873. According to the judgment of the other witnesses, it was then worth not more than from \$3,500 to \$4,000. There was a fall in the price of property between 1869 and 1873, and the depreciation continued and increased for several years. The defendant willfully disregarded the regulations made by the board of managers for the security of the depositors, by which it was, in effect, provided that no investment should be made unless approved by the finance committee, and that all applications for investment of the funds should be made to them alone. With full knowledge that the investment not only had not been duly authorized, but was one forbidden by



the charter, he, with the concurrence of the president, indeed, but, nevertheless, in violation of his duty and trust, as it was in violation of the duty and trust of the president, took from the funds of the bank, by check drawn by himself as treasurer, the amount of the bond and mortgage on the assignment of those instruments to the bank. Nor can he shelter himself under the suggestion that though he was a manager and officer he is to be regarded as standing in the relation of a stranger to the bank in this transaction. He was a trustee, and, as such, bound to protect the interests of his *cestuis que trust*. That obligation involved a strict adherence to the provisions of the charter and the regulations of the bank designed for their protection. He would not have been at liberty to disregard them if the application had come from a stranger; on what principle can he be justified in disregarding them in his own dealings with the bank? Had a stranger sought to obtain from the bank the money for the bond and mortgage, it would have been the duty of the defendant, if the matter came to his knowledge in time, to object to it, and if his objection had been unheeded, it would have then been incumbent on him to do what he could to prevent the illegal transaction. *Crane v. Hearn*, 11 C. E. Gr. 378. Manifestly, he is without excuse now. He has been guilty of a misapplication, at least, of the funds of the bank. And where there has been a waste or misapplication of the funds of a corporation by an officer or agent of the corporation, suit may be brought in equity, in the name of the company, to compel him to account for such waste or misapplication, or breach of trust. *Citizens Loan Assn. v. Lyon*, 2 Stev. Eq. 110; S. C. affirmed on appeal, 3 Stev. Eq. 732. Here the misapplication was by one who was not only an officer of the institution, but a trustee also. *Atty.-Gen. v. Mech. & Lab. Sav. Bk.*, 5 Stev. Eq. 163; *Hannon v. Williams*, 7 Stev. Eq. 255. And he is bound to indemnify his *cestuis que trust*, and the receiver may maintain suit against him to obtain the indemnity. The receiver of an insolvent corporation takes all the rights of action which the corporation itself had, and may enforce them by the same legal remedies. *High on Rec.* § 316; *Wilson's Exr. v. Rec. N. J. Mut. L. Ins. Co.*, 14

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Vr. The defendant urges, in his defence, that it was incumbent on the corporation to repudiate the transaction, if it was objectionable, within a reasonable time, and that its failure to do so for the period which elapsed between the time when it took place, May, 1873, and the decree of insolvency, March, 1879, nearly six years, is a bar, in equity, to any recovery against him. But there is no evidence that his co-trustees, not even the president himself, by whose co-operation he was enabled to obtain the money, were ever aware of the illegality of the transaction; that any of them ever knew that the mortgage was such, by reason of the inadequacy of the mortgaged premises to answer the requirements of the charter, as the institution had no right to take, as an investment of the trust funds confided to its care. By the custom of the bank, its mortgages and other securities were placed and remained in the custody, or subject to the control, of the president, and the mortgage in question, when it was assigned, was delivered by the defendant into the charge of the president and secretary, in the usual way, and remained there as part of the assets of the institution. The president, with the knowledge and consent of the defendant, unlawfully usurped the province of the finance committee in making the investment, and from the time when the investment was made, had the custody or control of the mortgage. He does not appear to have made any inquiry whatever as to the value of the property, or to have had any knowledge or information on the subject. It not only does not appear that any of the other managers had any knowledge or information on the subject, but it is a fair inference, from the evidence, that they knew nothing of the merits or demerits of the transaction. But had it been otherwise, the fact would not have availed the defendant as a defence to the claim now made against him. The countenance of his co-trustees in his breach of his trust would not have excused him from liability for it. Soon after the receiver was appointed he discovered, on investigation, the character of the transaction, and he then tendered to the defendant the bond and mortgage (the latter was then in course of foreclosure), with a re-assignment thereof to him, and demanded of him the \$3,000, and so much of the in-

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terest as had not been collected by the bank upon them. The defendant refused to receive them and pay the money. The receiver appears to have acted promptly. There will be a decree that the defendant pay the receiver the sum of \$2,765.69 before mentioned, the balance which, on the 17th of July, 1879, remained due on the investment, after applying the proceeds of the sheriff's sale, with interest thereon from that date, and the costs of this suit.

The supplemental bill sets up the proceedings in the foreclosure suit after the filing of the original bill; that notice was given by the complainant to the defendant of the sale under the execution in that suit, to the end that he might protect himself, and the sale by the sheriff and the purchase of the property by the defendant thereat &c. The demurrer to that bill will be overruled, with costs.

MATTHIAS M. COMBS.

v.

THE SHREWSBURY MUTUAL FIRE INSURANCE COMPANY.

1. Where one insured in a mutual company notified their agent that he had obtained other insurance on the premises, and the agent afterwards referring to the matter informed him that his insurance was all right—*Held*, that the company was bound by the notice and declaration of the agent.

2. One of the additional policies having afterwards been canceled and another for the same amount written in another company, and the same agent, on inquiry by the insured, having stated that notice of such substitution was unnecessary—*Held*, that the company was bound by the notice to him.

3. The partnership in whose name the policy was issued was dissolved before the fire, and the retiring partner's interest transferred to his copartner, who continued the business, and the company paid a dividend to him after such transfer—*Held*, that they, by the payment, waived any objection they might have had on that score.

Bill for relief. On final hearing on pleadings and proofs.

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Mr. S. M. Schanck and *Mr. W. D. Holt*, for complainant.

Mr. W. H. Vredenburg, for defendant.

THE CHANCELLOR.

This suit is brought on a policy of insurance to recover \$3,000 (and interest) for the damages sustained by the destruction by fire of a grist-mill in Hightstown. The policy was issued by the defendant March 16th, 1869, to Charles H. Woodward and John Silvers, who were then partners and owned the property. By it the defendant agreed to insure them against loss or damage (not exceeding \$3,000) by fire to the mill for five years from the 24th of that month. In May, 1869, Woodward and Silvers assigned the policy, with the consent of the company, to Archibald F. Job, as collateral security for the payment of their mortgage to him for \$7,000. Woodward and Silvers dissolved partnership April 1st, 1871, and the former conveyed his interest in the property to the latter. The fire occurred April 13th, 1872, and the building and machinery were practically a total loss. On the 18th of May, 1874, Silvers assigned the policy (the assignment to Job was still in force) to the complainant. On April 1st, 1878, Job's mortgage was paid off, but he never re-assigned the policy. The bill was filed October 1st, 1878. No notice

NOTE.—A part or joint-owner of property may insure his interest therein, *Franklin Ins. Co. v. Drake*, 2 B. Mon. 47; *Turner v. Burrows*, 5 Wend. 541, 8 Wend. 144, 24 Wend. 276; *Pratt v. Phoenix Ins. Co.*, 1 Broune (Pa.) 267; *Converse v. Citizens Ins. Co.*, 10 Cush. 37; *Pitney v. Glens Falls Co.*, 61 Barb. 335, 65 N. Y. 6; and such insurance does not ordinarily cover the interest of the other owners, although the policy may be for the full value of the property, *Irving v. Excelsior Ins. Co.*, 1 Bosw. 507; *Graves v. Boston Ins. Co.*, 2 Cranch 419; *Bailey v. Hope Ins. Co.*, 56 Me. 474; *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Murray v. Columbia Co.*, 11 Johns. 302; *Harvey v. Cherry*, 12 Hus. 555, 76 N. Y. 436; *Miller v. Eagle Ins. Co.*, 2 E. D. Smith 268; *Millaudon v. Atlantic Ins. Co.*, 8 La. 557; *Finney v. Bedford Ins. Co.*, 8 Metc. 348; *McCormick v. Ferrier, Hay, & Jon.* 12; *Ohl v. Eagle Co.*, 4 Mason 172; but the policy may be reformed so as to cover all the interests, if a mistake be shown, *Kidd v. Globe Ins. Co.*, 52 Ill. 518; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Snell v. Atlantic Ins. Co.*, 98 U. S. 85; or such insurance may be ratified afterwards by the other owners, *Turner v. Burrows*, 8 Wend. 144.

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of the transfer by Woodward to Silvers of his interest in the property was given to the company. When the policy was taken out in March, 1869, there were on the property four other valid and subsisting policies of insurance for \$2,000 each, against loss or damage by fire, in other companies, taken out by and in favor of Woodward and Silvers. They were for one year, and expired in or about January, 1870, and in March of that year four new policies for three years were issued to Woodward and Silvers by the same companies on the property, for \$1,650 each, \$900 on the mill and \$750 on the machinery. Whether the defendant had notice thereof and consented thereto, is the main question discussed on the hearing. It should be stated that on the 6th of October, 1871, after the transfer by Woodward to Silvers, the defendant, through its agent, Ira Smock, through whom the insurance in question was taken, paid a dividend of its profits to Silvers. It was awarded by the company, however, to Woodward and Silvers, but they had then dissolved partnership, and Smock knew it. The policies taken out in other companies were not taken out through Smock, but through an agent named Pearce. The policy in suit provided that in case the insured should have already any other insurance against loss by fire on the property thereby insured of which notice was not given to the defendant and mention made in or endorsement

One joint owner may recover his portion from the other, *Starks v. Sikes*, 8 Gray 609; *Manhattan Ins. Co. v. Webster*, 59 Pa. St. 227; *Briggs v. Call*, 5 Metc. 504.

If a joint insurance be averred, proof of insurance to only one cannot be shown, *Burgher v. Columbian Ins. Co.*, 17 Barb. 274; *Tate v. Citizens Co.*, 13 Gray 79; nor the converse, *Stetson v. Ins. Co.*, 3 Phila. 380; but if the policy be issued to A and B, loss first payable to A, he may recover, *Westchester Ins. Co. v. Foster*, 90 Ill. 121.

An insurance for the benefit of the actual responsible partner is good, although taken in the name of the firm and not disclosed, *Phoenix Ins. Co. v. Hamilton*, 14 Wall. 504; *Gould v. York Ins. Co.*, 47 Me. 403.

An insurance by another joint-owner of his interest, without notifying the company of the prior insurance of another owner, does not affect the latter, *Franklin Ins. Co. v. Drake*, 2 B. Mon. 47; or, a claim of a homestead by one partner in violation of a condition in the policy, *West Rockingham Ins. Co. v. Sheets*, 26 Gratt. 854.

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thereof made on the policy, the insurance effected by the policy should be void and of no effect. And further, that if the insured or their assigns should thereafter make any insurance on the same property, and not give notice thereof to the defendant and have the same endorsed on the policy or otherwise acknowledged by the defendant in writing, the policy should cease and be of no further effect.

There was also a by-law of the company as follows:

"To prevent frauds and avoid inconveniences, no person or persons insuring their buildings or property in the office of this institution, shall receive benefit from the same if such building, buildings or property are insured in any other office or place unless such insurance is made known to the directors, their approbation obtained, and an endorsement to that effect made upon the policy of this company."

It appears by the evidence that when the policy in suit was issued there was other insurance in other companies upon the property to the amount of \$8,000. Whether the agent of the defendant was notified of it or not, does not appear distinctly. He says he thinks he did not know of it. But, however that may have been, those policies expired late in 1869, and others, having three years to run, were taken in their place from the same companies. Of those new policies the agent of the defend-

A stockholder may insure his interest in the corporation, *Warren v. Davenport Ins. Co.*, 31 Iowa 464; see *Phillips v. Knox Ins. Co.*, 20 Ohio 174; *Sweeney v. Franklin Ins. Co.*, 20 Pa. St. 337; *Shawmut Co. v. Hampden Ins. Co.*, 12 Gray 540.

A conveyance of an undivided interest, by the assured, avoids the policy, *Western Ins. Co. v. Riker*, 10 Mich. 279. See *West Branch Co. v. Helfenstein*, 40 Pa. St. 289; *Stetson v. Mass. Co.*, 4 Mass. 330.

Aliter, as to an acquisition of such interest, where the grantee had a policy on the premises in another right, *Burbank v. McCluer*, 54 N. H. 339; *Heaton v. Manhattan Ins. Co.*, 7 R. I. 502; *Cowan v. Iowa Ins. Co.*, 40 Iowa 551. See *Peoria Ins. Co. v. Hall*, 12 Mich. 202; *Rankin v. Andes Ins. Co.*, 47 Vt. 144.

Partners cannot have insured as their property, lands of which one partner holds the title, although the firm has the use thereof, *Citizens Ins. Co. v. Doll*, 35 Md. 89. See *Casner v. Farmers Ins. Co.* (Mich.), 7 South. Law Rev. 433; *Peck v. New London Ins. Co.*, 22 Conn. 575.

A conveyance of the property insured does not carry with it an assignment

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ant had notice. And he notified the defendant. Silvers testifies on the subject that he notified Smock of the taking out of those policies and requested him to notify the company that he had so effected more insurance on the property and Smock promised to do so; that afterwards Smock told him the company wanted an estimate of the value of the property and read to him a letter which he had received from the company on the subject; that he referred Smock to the estimate which Pearce, the agent through whom the policies in the other companies had been obtained, had made, and offered to get it; that he went to Pearce's office and got it and gave it to Smock; that Smock wrote a letter, put the estimate in it and sealed it in his presence, and said that when he went to dinner he would put it in the post-office; that the letter was written to some of the officers of the company, he thinks to Wolcott (then treasurer); that he met Smock again some time afterwards, probably two or three weeks, and as he was about to pass by him, Smock said:

"Oh! I've got a letter from the Shrewsbury Fire Insurance Company and your insurance is all right."

This statement is not contradicted, nor is its credibility in

of the policy of insurance thereon, *Hobbs v. Memphis Ins. Co.*, 1 Sneed 444; *Kitts v. Massasoit Ins. Co.*, 56 Barb. 177; *Sherwood v. Agricultural Ins. Co.*, 10 Hun 593. See *Hamilton v. Baldwin*, 15 Bear. 232.

The death of the assured does not terminate the policy, and his heirs or representatives may recover, *Geo. Home Ins. Co. v. Kinnier*, 28 Gratt. 88; *Burbank v. Rockingham Ins. Co.*, 24 N. H. 550; *Lappin v. Charter Oak Ins. Co.*, 58 Barb. 325; so, a surviving partner, *Oakman v. Dorchester Ins. Co.*, 38 Mass. 57; *Wood v. Rutland Ins. Co.*, 31 Vt. 552. See *Work v. Merchants Co.*, 11 Cush. 271; and a loss before the deed has been delivered in a partition among the heirs, has been held recoverable, *Gates v. Smith*, 4 Edw. Ch. 702. See *Clinton v. Hope Ins. Co.*, 45 N. Y. 454; or, sale by the orphans court to pay debts of the decedent, before confirmation, *Farmers Ins. Co. v. Graybill*, 74 Pa. St. 17. *Aliter* after partition consummated, *Barnes v. Union Mut. Ins. Co.*, 51 Me. 110. (See *Allison v. Phoenix Ins. Co.*, 3 Dillon 480, 486).

A transfer by one partner or tenant in common to another, has been held not to be an alienation, within the meaning of the usual condition in a policy, so as to avoid it, in the following cases: *McMasters v. Westchester Ins. Co.*, 25 Wend. 379; *Wilson v. Genesee Co.*, 16 Barb. 511; *Hoffman v. Aetna Ins. Co.*,

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any wise impeached. On the other hand, it is corroborated in some very material respects. It is admitted that Wolcott wrote a letter to Smock, dated March 7th, 1870, in which, after acknowledging the receipt of a letter from Smock on the subject of the additional insurance, he says:

"Before giving our assent or approval of the additional insurance asked for, please give in the best of thy knowledge the present value of said mill and contents, together with the name of each office and amount insured in each."

Smock has no recollection of the transaction beyond the receipt of that letter, and he had wholly forgotten that until the letter was found by Silvers among Smock's letters. Smock, soon after the fire, in a conversation with Silvers, denied that he had ever had any notice whatever of the additional insurance, and declared that he was willing to testify that he had never had any, but after the letter was found he remembered the fact that he received it, but he does not remember writing the letter to which it is an answer, nor does he remember whether he answered the treasurer's letter or not. He evidently remembers but little of the matter, and no reliance is to be placed on his

19 *Abb. Pr.* 325, 1 *Roberts*, 501, 32 *N. Y.* 405; *Insurance Co. v. Thompson*, 5 *Otto* 547, 550; *Burnett v. Eufaula Ins. Co.*, 46 *Ala.* 11; *Dermani v. Home Ins. Co.*, 26 *La. Ann.* 69; *Lockwood v. Middlesex Assurance Co.*, 47 *Conn.* 553; *Pierce v. Nashua Ins. Co.*, 50 *N. H.* 297; *Texas Ins. Co. v. Cohen*, 47 *Tex.* 406; *West v. Citizens Ins. Co.*, 37 *Ohio St.* 1; *Cowan v. Iowa Ins. Co.*, 40 *Iowa* 551; *Hobbs v. Memphis Ins. Co.*, 1 *Sneed* 444. See *Mann v. Western Assurance Co.*, 19 *U. C. Q. B.* 314; *Hutchinson v. Niagara Ins. Co.*, 39 *U. C. Q. B.* 483.

But a contrary rule has been held in *Hartford Ins. Co. v. Ross*, 23 *Ind.* 179; *Dix v. Mercantile Ins. Co.*, 22 *Ill.* 272; *Keeler v. Niagara Ins. Co.*, 16 *Wis.* 550; *Dreher v. Aetna Ins. Co.*, 18 *Mo.* 128; *Curd v. Phoenix Ins. Co.*, 4 *Mo. App.* 424; *Murdock v. Chenango Ins. Co.*, 2 *N. Y.* 210; *Tillou v. Kingston Ins. Co.*, 5 *N. Y.* 405; *Howard v. Albany Ins. Co.*, 3 *Denio* 301; *Baltimore Ins. Co. v. McGowan*, 16 *Md.* 47; *Finley v. Lycoming Ins. Co.*, 30 *Pa. St.* 311; *Buckley v. Garrett*, 47 *Pa. St.* 204; *Portsmouth Ins. Co. v. Brinckley (Va.)*, 2 *Ins. Law Jour.* 842. See, further, *Collins v. Charlestown Ins. Co.*, 10 *Gray* 155; *Dey v. Poughkeepsie Ins. Co.*, 23 *Barb.* 623; *Keeney v. Home Ins. Co.*, 3 *N. Y. Supr. Ct.* 478, 71 *N. Y.* 396; *Shuggart v. Lycoming Ins. Co.*, 55 *Cal.* 408; *Home Ins. Co. v. Hauslein*, 60 *Ill.* 521.—*REP.*

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recollection in regard to it. The letter corroborates Silvers in his statement that he gave notice to Smock of the additional insurance and requested him to get the company's consent, and that Smock showed him a letter he had received from one of the officers (he says he thinks it was Wolcott) asking for an estimate of the value of the property. Silvers, as before stated, testifies explicitly that the estimate was furnished by him, was enclosed by Smock in his presence in a letter to the company which he said he was going to put in the post-office on his way to dinner, and that afterwards Smock told him of his own accord that he had got a letter from the company and his insurance was "all right,"—in other words, that the company consented to the additional insurance. The company is bound by the notice given to its agent. *Schenck v. Mercer Co. Ins. Co.*, 4 Zab. 447.

But further—though, according to the company, it never received any answer to the letter above quoted—it appears, according to its version of the transaction, that it never took any further action in the matter, but with the knowledge that the additional insurance had been obtained, and that its consent to it was desired for the protection and security of Woodward and Silvers, it did not notify them that it would cancel its policy, but not only left them to understand that their policy was valid, but held them, up to the time of the fire, as members of the company, liable to contribute, through assessment, to the payment of its losses. On the statement of the officers of the company themselves, fair dealing required the company, if it declined, in view of the additional insurance, to continue the policy, to notify Woodward and Silvers of the fact without delay, in order that they might obtain insurance elsewhere, and their liability as members of the company might cease. And if they received no reply to the treasurer's letter to Smock, within a reasonable time, it was their duty to press the matter to a reply, or give notice of the cancellation of the policy in their company. The notice of the additional insurance was given as early as March 6th, 1870, and the fire did not take place until April 13th, 1872, over two years afterwards; and in all that time, the company, although it had notice of the additional insurance, and had

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asked for more particular information on the subject than was given in the notification, but had not, as it says, received it, did no act to indicate unwillingness to continue its policy. On the contrary, in October, 1871, it paid Silvers, as one of its members, by virtue of the policy, a dividend of its profits, and during the whole period from March, 1870, to April, 1872, held him and Woodward liable, as members, by virtue of the policy, to contribute to the losses which it might sustain. It must, under the circumstances, be held to have acquiesced in and consented to the additional insurance. Nor is it at all clear that it did not receive the information asked for in the letter of March 7th, 1870, and give its consent in writing, by letter, as Silvers swears Smock told him it did. The business of the company appears to have been done somewhat loosely, to say the least of it, and it is not at all surprising to find that there is a want of knowledge or recollection as to the transaction on the part of the officers, for they testify at the distance of ten years after it took place. Moreover, the company is estopped by the statements of its agent, and although the insured cannot produce the company's acknowledgment in writing, he produces proof, by the statement of its agent, that it was thus made, for, as before stated, Smock told Silvers that he had received a letter from the company, and (in substance) that the company was satisfied with and assented to the additional insurance.

In *Mentz v. Lancaster Fire Ins. Co.*, 79 Pa. St. 475, where the plaintiff insured in the defendant company, and one condition was that if additional insurance were effected, it should be endorsed on the policy, the plaintiff effected additional insurance in another company, with its agents, who were also agents of the defendant. On inquiry by the plaintiff, who gave his policy to the defendants' agent, the latter untruly told him that the endorsement of the additional insurance had been made on the policy issued by the defendant. It was held that the defendant was estopped, by the declaration of its agent, from objecting to the want of endorsement. Judge Sharswood, delivering the opinion of the court, said :

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"It was admitted, on the trial of the cause below, that Murray & Clow were the agents, at Titusville, of the defendant in error and the Armenia Fire Insurance Company. There was no evidence tending to show that their powers were special. It must be assumed, then, that they were authorized to act as the general agents of the companies in all matters relating to the effecting of insurance on their behalf. It may be conceded that, as such general agents, they would have no power to waive an express condition in the policy. But the question was not of their power to do this, but whether their declaration of a fact, namely, that the condition had been actually complied with, would not estop the company from controverting that fact. The evidence offered and rejected was that the agent had told the assured that the proper endorsement had been made on the policy. Now, such a declaration, made by a duly authorized agent or officer, would clearly operate as an estoppel. It lulled the party to sleep by the assurance that the conditions of the policy had been complied with, and that the indemnity was secured."

As to the character of Smock's agency, there is nothing in the letter of appointment to limit his authority. He is thereby informed that he has been appointed an agent of the company. Though the letter states that the appointment was made at a special meeting of the directors, held at Eatontown on the 11th of February, 1856, I find no minutes of such meeting. It appears, from the letter, that he was appointed a general agent. He advertised himself as agent of the company.

The defendant insists that if it be held to have received due notice of the additional insurance in March, 1870, it had none of the cancellation of one of the policies (in the International Insurance Company of New York) in June, 1871, and a substitution of a policy for the same amount, in another company, the Franklin Fire Insurance Company of Philadelphia. But the proof is that notice was given to Smock by Silvers, who asked him whether it was necessary to notify the company, and he replied that he thought it was not.

Silvers did not notify the company of the transfer of Woodward's interest in the property to him, and the company insists that, therefore, the policy is annulled, under the provision that, in case of any transfer of the interest of the insured in the property, either by sale or otherwise, without the consent of the company, the policy shall from thenceforth be void and of no effect. But, in the first place, it is at least doubtful whether it was

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intended that that provision should extend to the transfer by one of the joint owners of his interest in the property, to the other. The risk would not be in any wise affected by the transfer. No new owner would be introduced. The company originally insured Silvers as one of the joint owners of the property, and all the change wrought by the transfer, on this head, was that, after it, the insurance was for his benefit alone, as sole owner, whereas, before, it was for his interest and that of Woodward, as joint owners. In the next place, the payment of the dividend to Silvers alone, in October, 1871, after the transfer took place, and with knowledge of it, was a waiver of objection on that ground. And again, Silvers swears that, at a meeting of the defendants' board of directors, held after the fire, and at which he was present, this objection was expressly waived. He says that, when he asked if they intended to take advantage of it, they said they had made it a rule not to take advantage of that objection where the risk was not increased, and they did not claim that, in this case, the risk had been increased, and waived the objection. He further says that they said that the only ground on which they put their refusal to pay the claim was, that he had got other insurance without their consent.

Objection is made by the defendant on the ground of delay in bringing suit. The policy contains no limitation, and the answer sets up no defence, either of laches or limitation.

There will be a decree for the complainant for the amount insured, with interest, for the property was worth more than all the insurance on it. The policy provides that payment shall be made within ninety days after proof of loss. The proof (which is lost) was made and served apparently about thirty days after the fire. The complainant will be allowed interest from a period of one hundred and twenty days from the time of the fire.

Shreve v. Hankinson.

MARY H. SHREVE

v.

JOHN B. HANKINSON et al.

Pending the foreclosure of a mortgage on a farm, a receiver was, with the written consent of the solicitors of all the parties in interest, appointed, with power to let the premises.—*Held*, that he could let the farm for a year without a special order, that being the usual term for such leases, and that such lease was neither limited nor terminated by the duration of the suit.

Bill to foreclose. Motion in behalf of purchaser at sheriff's sale for order for possession.

Mr. C. E. Hendrickson and *Mr. B. Gummere*, for the motion.

Mr. W. A. Barrows, for the tenant in possession and John B. Hankinson.

Mr. Sooy, for the tenant and receiver.

THE CHANCELLOR.

The H. B. Smith Machine Company, the purchaser of the mortgaged premises at the sheriff's sale under the execution in

NOTE.—Under the English rule, the practice was that a receiver must obtain the direction of the court before letting lands, *Neale v. Bealing*, 3 Swanst. 304; *Ray v. —*, *Id.* 305; *Morris v. Elme*, 1 Ves. 139; *Swaby v. Dickon*, 5 Sim. 631; *Roberts v. Armstrong*, 1 Moll. 27; or, the approbation of the master, *Duffield v. Elwes*, 11 Beav. 590; — *v. Lindsey*, 15 Ves. 91; *Fortescue v. Armstrong*, L. R. (2 Irish Eq.) 261; even for one year, *Wynne v. Newborough*, 1 Ves. 164.

He cannot lease so as to bind remaindermen, *Gibbins v. Howell*, 3 Madd. 469; *Baylies v. Baylies*, 1 Coll. 537. See *Foster v. Merchant*, 1 Vern. 262; *Ex parte Dikes*, 8 Ves. 79; nor bring ejectment against his tenants, *Wynne v. Newborough*, 3 Bro. C. C. 88. See *Brooks v. Brooks*, 3 Ired. 392. The receiver may distrain, *Birch v. Oldis*, Sauss. & Sc. 146; *Anon.*, 3 Irish Law Rec. 35; *Swaby v. Dickon*,

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this cause, applies for an order requiring William A., John B. and Risdon Hankinson to surrender to it the possession of the property. Of those persons, the first named alone claims to be in actual possession. He resides on the property, and John B. Hankinson is his father, and lives with him there. Risdon Hankinson is his co-lessee of the premises, under a lease to them from the receiver appointed in this suit. He appears to have joined in the lease as surety for William. William claims the right of possession under the lease, which was made February 22d, 1881, and demised the premises (which are a farm of about one hundred and sixty acres, in Burlington county) for one year from March 25th following, on the terms usual in agricultural tenancies, at a rent of \$500 for the term, payable one-half on the 20th of September, 1881, and the other on the 20th of March, 1882. The bill was filed on February 26th, 1880, and Risdon Hankinson filed a cross-bill on June 16th following. The final decree was made on July 5th, 1881, and the sale under the execution took place on September 24th, 1881. About a year after the filing of the original bill, an order was made, with the written assent of all the parties in interest, appointing a receiver to take charge of the mortgaged premises and to manage them, with power to sue for, collect and receive the rents, issues and profits thereof, to let the property from time to time, and to agree concerning the rents to be paid therefor, and to do all things necessary for the care and management of the premises; and he was required to give bond for the faithful performance of his duties

5 Sim. 631; *Spinner v. Spinner*, 1 Moll. 27. See *Erton v. Denbigh R. R.*, 1 R. (6 Eq.) 14, 488; *Dancer v. Hastings*, 4 Bing. 2. But cannot be distrained. *Noe v. Gibson*, 7 Paige 513; *In re Perse*, 8 Irish Eq. 111. Where such tenant hold over they are liable to the receiver for subsequent rent, *Hunt v. Wolfe*, Daly 298; *Albany Bank v. Bank of Monroe*, Clarke 297.

He may procure a prohibition against his tenant's removal by a justice. *People v. McAdam*, 22 Hun 559; or stay the interception of rents, *Hazebrigg v. Brough* (Ky.), 8 Reporter 557.

The tenant may, without being made a party to the application, be enjoined from removing crops from the premises, contrary to the custom of the country. *Walton v. Johnson*, 15 Sim. 352; *Mahony v. Aylward*, 1 Moll. 27.

The former tenant's rights, if any, against the mortgagor are not to be pro-

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The petition states that neither the decree nor execution made any reservation in favor of the lessees, and that the price at which the property was struck off to the petitioner, was a full one for the premises; and the proof is that when the petitioner's agent asked the sheriff, during the bidding and just before making the last bid, whether possession would be given with the title, the sheriff said "Yes; he supposed so." The petitioner insists that the receiver had no authority to make the lease without a special order of the court (and none was obtained); and that, whether the lease was duly made or not, the purchaser of the property under the decree and execution is entitled to possession at the hands of the court; seeing that, as before mentioned, no reservation was made in favor of the lessees. The petition also alleges that the lease is at a very low and insufficient rent, and that the rent due in September, 1881, has not been paid.

The order appointing the receiver was made with the concurrence of all the parties interested in the property, signified by the written assent of their respective solicitors to the order. The order gave the receiver authority to let the premises from time to time. Under that authority he had power to let the premises for the term for which he leased them, without a special order. 2 *Dan. Ch. Pr.* 1749; *Kerr on Rec.* 195; *Edw. on Rec.* 123. Where, as in this case, the property is a farm, if it be leased at all, the lease must necessarily be, as to term and otherwise, in accordance with the nature of the thing demised. The receiver was appointed in the winter of 1881, and it undoubtedly appeared

judiced, *Mansfield v. Hamilton*, 2 *Sch. & Lef.* 28; *Sealy v. Munna*, 1 *Irish Eq.* 372. See *Neale v. Bussing* (N. Y. C. P.), 10 *Reporter* 153; *Singerly v. Fox*, 75 *Pa. St.* 112; *Bowery Bank v. Richards*, 3 *Hun* 366. The application, *semble*, ought not to be made by the receiver, *Wrixon v. Vize*, 5 *Irish Eq.* 276; *Bruce v. Blennerhassett*, *Id.* 277, note; *Meares v. Bannon*, 4 *Irish Eq.* 168.

The receiver is liable for any loss the estate may sustain by a tenant quitting possession, where the receiver does not apply promptly to the court for authority to relet, *Wilkins v. Lynch*, 2 *Moll.* 499.

Where the mortgagee is receiver, he must obtain as large a rental as he can, although it may exceed his mortgage, *Bolles v. Duff*, 37 *How. Pr.* 162. The receiver cannot become his own tenant, *Alven v. Bond*, 3 *Irish Eq.* 372; *Stanis v. French*, 1 *Irish Jur.* 299, 13 *Irish Eq.* 161.

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clearly to be advantageous to all the parties, as well in view of the possible, if not probable, length of the litigation as other equally obvious considerations, that a lease should be made for the ensuing agricultural year, and therefore the appointment of a receiver was agreed to. The lease was made in the same month, and the term began with the agricultural year. No advantageous lease could have been made for a shorter term, and, though over a month elapsed between the making of the lease and the commencement of the term, no complaint was made that the rent was inadequate. There can be no doubt of the power of the court to make such a lease under the circumstances, and it is not confined in its power to letting the mortgaged premises for a term not to extend beyond the period of the termination of the suit; for the suit may be ended at any time by a compromise or other arrangement, and therefore, to limit the power of the court in the premises to the duration of the suit, would be, substantially and practically, to deny the existence of the power. If the court had the power to make the lease, most manifestly the purchaser under the decree cannot, merely as and because it is purchaser, successfully invoke its aid to expel its lessees from the property before the expiration of their term. But it is urged that if that be so, the court has not dealt fairly with the purchaser, for there was then, when the property was sold, an unknown and concealed encumbrance on it—one put on it by the court itself. It would have been proper practice to mention the lease in the decree and execution, but it appears not to have been done. The

A lease by the receiver for a term shorter than usual may be authorized, if beneficial to the estate, *Buckworth v. Morgan, Smith's (Irish) Rec. 82*.

The Irish rule seems to be to let for seven years or pending the suit, *Cox v. Cox, 2 Irish Eq. 160*; *O'Connell v. O'Callaghan, 3 Id. 199*; and where the suit is determined before the expiration of the term, the tenant is entitled to emblements, *Creed v. Creed, 3 Irish Eq. 207*.

Where the tenant paid a year's rent in advance, on a seven years' term, and the suit was compromised within six months after the term began, he was held entitled to continue in possession for the year, *Lalor v. Netterville, 6 Irish Jur. 261*.

The court refused to grant to trustees, for the life of A, authority to rent part of the trust estate for ten years, *Shaw's Trusts, L. R. (12 Eq.) 124*.—*REP.*

Mutual Benefit Life Ins. Co. v. Gould.

remedy of the purchaser, however, is obvious. If, by reason of its want of notice of the existence of the lease, it has been led to buy the property, when, otherwise, it would not have done so, or to give a higher price than it would otherwise have done, its remedy is in an application to be relieved from its purchase. If it does not desire relief in that direction, it must take the property with the burden of the lease; but it will be entitled to the rent accruing from the day of sale. Fairness and a due regard to the policy which the court should observe in reference to sales under its orders or process, so as to invite, instead of deterring, bidders, require no more. The motion is denied, but without costs.

THE MUTUAL BENEFIT LIFE INSURANCE COMPANY

v.

EMILY R. GOULD et al.

1. A resale of premises, sold under a foreclosure execution, ordered, where one claiming an interest in the premises has, by neglect of her counsel, been deprived of an opportunity to protect that interest, and the property seems not to have produced the "highest and best price it would bring in cash at the time of the sale." (*P. L. of 1880 p. 255*).

2. The act of 1880, which requires that foreclosure sales shall not be confirmed, unless the property has been sold at the best price it would bring, applies to all foreclosure sales, and not merely to those in which a personal decree for deficiency is sought.

On objections to sheriff's sale. and petition to set aside sale.

Mr. Cortlandt Parker, for petitioner.

Mr. F. K. Howell, for complainant.

Mutual Benefit Life Ins. Co. v. Gould.

Mr. F. E. Bradner, for the defendants the Newark City National Bank and Longman.

Mr. H. M. Barrett, for the defendants Wilde.

THE CHANCELLOR

The petitioner asks that the sheriff's sale of mortgaged premises, under the execution in this cause (a suit for foreclosure), may be set aside on two grounds—surprise and inadequacy of price. The property is in Newark. It was struck off at the sale to the solicitor of the Newark City National Bank and Edward Longman, judgment creditors, at \$6,000. After the sale, the purchaser agreed with the Wildes, subsequent judgment creditors, to sell the property to them for the \$6,000 and the amount due to his clients on their judgments, and he directed the sheriff to make a deed to them accordingly. The money, however, has not yet been paid, nor the deed delivered. The amount due the complainant was about \$5,900. The petitioner claims to own half of the property, subject to the mortgage, by title superior to the judgments, and, failing that (her deed therefor having been by a decree of this court declared void as against the judgments of the bank, Longman and the Wildes, from which decree she has appealed), she claims her dower in the surplus remaining after paying the amount due the complainant. She directed her solicitors to attend the sale, and directed them to bid the property up for her to \$7,300, and they agreed to do so. They charged one of their assistants, also a lawyer, with the duty. He attended on two occasions, but the sale was then adjourned. On the day to which it was last adjourned he forgot the matter, and did not attend, and the property was then sold in his absence; consequently nobody was present on her behalf. She lived in New York city, and relied wholly on her solicitors to attend to the sale for her. The sale was, beyond all question, a surprise upon her. There is no proof as to what the property would probably bring on a resale. A very competent judge of the value testifies that its market value is at least \$10,000. but he does not state what, in

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his opinion, it would bring at sheriff's sale, which is oftentimes a very different thing. I am satisfied that the property has not been sold for the highest and best price it would bring, in cash, at the time of sale, but it was because of the failure of the petitioner's agent to attend the sale. And here it will not be out of place to notice the argument of the purchaser's counsel, that the provision contained in the fourth section of the act "concerning proceedings on bonds and mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder" (*P. L. of 1880 p. 255, 256*), that sales under foreclosure proceedings shall not be confirmed, unless the court or judge is satisfied that the property has been sold at the highest and best price it would then bring, in cash, is applicable only to cases where there is a personal liability for deficiency. The argument is based on what, it is insisted, is the general object of the act, to protect, as far as practicable, persons liable for deficiency; but the provision under consideration will not admit of that construction. By its terms, it extends to all sales under foreclosure proceedings commenced after the approval of the act. The sale should be set aside on such terms as will secure the complainant from being prejudiced thereby. The petitioner must enter into an undertaking with sufficient security to bid \$6,000 on a resale. If she does so within five days from the time of filing the order on this decision, a resale will be ordered; otherwise the sale will be confirmed.

LUCY H. EDDY's executor

v.

J. SMITH HARTSHORNE et al

A legacy to A, with the "request" that, upon his death, he leave it to B, C and D, is imperative, and creates a trust in favor of B, C and D which is not defeated by the death of A before the testator.

Eddy v. Hartshorne.

Bill for construction of will and directions.

Mr. B. A. Vail, for complainant.

Mr. C. H. Hartshorne, for Samuel H., John S. and William Hartshorne.

Mr. George Biddle, of Philadelphia, for certain of the legatees, Mary and Rebecca Harvey, Mary H. Biddle (*née* Rodgers) and Emily Rodgers.

THE CHANCELLOR.

The testatrix, who died in 1879, by the third section of her will, among other bequests, made the following:

"To *Pendleton Hosack*, of New York city, two thousand dollars, with the request that, upon his death, he leaves the same, in equal portions, to *Mary Harvey*, *Rebecca Harvey* (daughters of *Mary Harvey*), *Mary Rogers* and *Emily Rogers* (daughters of *Emily H. Rogers*.)"

By the fifth, she provided as follows:

"*Fifthly*. If, by reason of any omission or failure in this my last will to provide for contingencies occurring by death or otherwise, or if for any cause any of the devises and bequests hereinabove made should lapse, or fail to vest in any of the persons, corporations, or associations hereinabove named, it is my will, and I hereby direct, that all and every of such devises and bequests shall revert to and form part of my residuary estate."

Pendleton Hosack died before the testatrix, and the question is presented whether the above legacy to him therefore lapsed and fell into the residuum of her estate, or whether, on her

NOTE.—Ordinarily, a "request" by a testator is construed as imperative, and creates a trust, *Pierson v. Garnet*, 2 Bro. C. C. 38, 226; *Eade v. Eade*, 5 Madd. 118; *Bernard v. Minshull*, Johns. (Eng.) 276; *O'Bierne's Case*, 1 Jon. & La Touche 352; *Shelley v. Shelley*, L. R. (6 Eq.) 540; *Finlay v. Fellows*, 11 Grant's Ch. 66; *Bohon v. Barret* (Ky.), 11 Reporter 339, 12 Cent. L. J. 543.

But even "request" may be subject to explanation or qualification by other clauses in the will, *Foose v. Whitmore*, 83 N. Y. 405; *Batchelor v. Macon*, 69 N. C. 545; *Barry v. Sturdivant*, 53 Miss. 491; *Bland v. Bland*, 2 Cox C. C. 351.

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death, it went to the persons to whom she requested him to leave it at his death.

The rule of the English chancery is, that when, by will, property is given absolutely to a person, and the same person is, by the giver, "recommended," "entreated," "requested" or "wished" to dispose of that property in favor of another, the recommendation, request or wish is held to be imperative, and to create a trust, if the subject and objects are certain. That rule is recognized and established here. In the case of *Van Duyne v. Van Duyne*, 1 *McCart*. 397 (*S. C. on appeal*, 2 *McCart*. 503), which was a suit for partition of lands of which Martin J. Van Duyne died seized, the complainant, Hiram Van Duyne, a grandson of Martin, claimed under the will of the latter to be entitled to one-half of the lands devised by the will to the testator's son and daughter, James and Hetty. The devise in the second clause of the will was of the homestead farm to James and Hetty, equally, with the following addition :

"To them, their heirs and assigns forever, hoping and believing that they will do justice hereafter to my grandson, Hiram Van Duyne, to the amount of one-half of said homestead farm."

And the complainant insisted that the words quoted created a trust in his favor for one-half of the homestead farm, after the death of James and Hetty. The third clause contained a devise in similar terms. The chancellor (Green), in an opinion in which the subject was fully discussed, and the English authorities considered, declined to adopt the rule of the English chancery, and held that no trust was created in favor of the complainant. The court of errors and appeals, however, reversed that

See *Whipple v. Adams*, 1 *Metc.* (Mass.) 444; *Edwards v. Smith*, 35 *Miss.* 197; *Schmucker v. Reel*, 61 *Mo.* 592; *McNeely v. McNeely*, 82 *N. C.* 183; *Stableton v. Ellison*, 21 *Ohio St.* 527; *Van Arnee v. Jackson*, 35 *Vt.* 173; *Lesesne v. Witte*, 5 *Rich.* (N. S.) 450; *Coz v. Rogers*, 77 *Pa. St.* 160.

So, where "request" is employed in connection with a similar expression, as "wish and request," *Foley v. Parry*, 2 *Myl. & K.* 138; or, "request and desire," *Williams v. Worthington*, 49 *Md.* 572; or, "requested and entrusted," *Spurgeon v. Scheible*, 43 *Ind.* 216; or, "require and entreat," *Taylor v. George*,

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part of the decree. No opinion appears to have been filed in that court; but the complainant's title, which was denied by the chancellor, rested only on the clause expressing hope and confidence, and therefore, in reversing the decree, the court of last resort gave that effect to that language for which the complainant contended, and which was denied in this court, and consequently held that it gave him title. In the devise in that case the words to be construed were "hoping and believing that they [the testator's son and daughter] will do justice to" the grandson "to the amount of half of the" property. Here the word "request" is employed; a word more indicative of an intention to make it obligatory on the legatee to give the fund to the persons named than the words used there. In the bequest under consideration the request extends to the whole of the fund, and to the manner in which it shall be divided. The gift is to Pendleton Hosack, with the request that he leave the money (the whole of it) at his death (the testatrix thus manifesting an intention that he should only have it for life), in equal portions to the persons named. The English cases in which words of request have been held to be imperative, and create a trust, are numerous. See *Theobald on Wills* 249, 250, and *Hawk. on Wills* 160 *et seq.* But further: in the present case there is no room for question as to the obligatory effect of the request upon the person to whom the gift is primarily made; for, as to him, it is as if it had never been made. It lapsed as to him, and, under the circumstances, the gift is tantamount to a gift over in case he should predecease the testatrix. The only question is, whether his death caused the legacy to lapse altogether, or only as to him. That it did not lapse as to the other persons, is clear. The tes-

2 *Ves. & B.* 378; or, "will and desire," *Anderson v. Hammond*, 2 *Lea* 231; *Lines v. Darden*, 5 *Fla.* 51; *Cate v. Cranor*, 30 *Ind.* 292; *Reid v. Porter*, 54 *Mo.* 265; *Collins v. Hope*, 20 *Ohio* 492; or, "wish and will," *McRee v. Means*, 34 *Ala.* 349; or, "wish and desire," *Phebe v. Quillin*, 21 *Ark.* 490; *Cockrill v. Armstrong*, 31 *Ark.* 580; *Cobb v. Battle*, 34 *Ga.* 458; *Barrett v. Marsh*, 126 *Mass.* 213; *Brasher v. Marsh*, 15 *Ohio St.* 103; *Baby v. Miller*, 1 *U. C. E. & A.* 218; or, "wish and direct," *Neff v. Neff*, 3 *W. L. G. (Ohio)* 67; see also 4 *Am. Law Rev.* 617.—**REP.**

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tatrix manifestly intended that the money should go to them on his death. To hold that it lapsed as to them would obviously defeat her intention.

The residuary clause of the will is as follows :

" All the rest and residue of my estate, both real and personal, whatsoever and wheresoever, I give, devise and bequeath to John Hartshorne, of Newark, New Jersey; Eliza B. Hosack, of New York city; Emily H. Rodgers, of New York city, and Lucy E. Chapman, of Rahway, New Jersey, in equal shares; to them, their heirs and assigns forever; but in case John Hartshorne and Samuel H. Hartshorne, or either of them, should not be living at the time of my decease, then I direct that the share they would have had, if living, should descend to and vest in his children *per stirpes*."

By the third clause of the will, a legacy of \$2,000 is given to John Hartshorne. He died before the testatrix, and the question is, whether, under the provision of the residuary clause, that in case he should die before the testatrix, the "share he would have had, if living, shall descend to and vest in his children," the legacy goes to his children. The fifth section of the will, above quoted, evidences the intention of the testatrix on this subject. It declares that it is her will, and that she directs that if any of the bequests thereinbefore made (of which this is one) should lapse or fail to vest in any of the legatees, it shall fall into the residue. And without that provision such would have been the consequence of the lapse. A lapse of the legacy in question is not prevented by the provision against lapse in the residuary clause; for that provision clearly has no reference to the legacies of \$2,000 each given to John and Samuel H. Hartshorne in the third clause, but only to their shares of the residuum of the estate.

It will be decreed that Mary and Rebecca Harvey and Mary Biddle (formerly Rodgers) and Emily Rodgers are entitled in equal shares to the \$2,000 given to Pendleton Hosack, and that the legacy of \$2,000 to John Hartshorne lapsed and fell into the residue.

Smith v. Bayright.

JOSEPH S. SMITH

v.

FRANCES E. BAYRIGHT et al.

A non-resident monomaniac was made a party to proceedings in partition. She had never been declared a lunatic, and a guardian *ad litem* was appointed to protect her interests in the suit. The premises were sold, and her share of the proceeds paid into court in 1871. From 1871 to 1878 she was confined in an insane asylum in Pennsylvania, but from 1878 until her death in 1880, she lived at her own home in that state. She frequently declared her intention of obtaining the money paid into court as her share, but died without having done so.—*Held*, that the fund, including the accrued interest, was personalty, and payable to her administrator.

In partition. On petition of Israel H. Johnson, administrator of Sarah M. Livesey, for the payment to the persons entitled thereto, of the money deposited in court as her share of the property sold in partition.

Mr. S. M. Dickinson, for petitioner.

NOTE.—Courts may authorize a change of a lunatic's lands into personalty, or *vice versa*, *Salisbury's Case*, 3 John. Ch. 347; *Ex parte Bromfield*, 1 Ves. 453, 3 Bro. C. C. 510; *Sergeson v. Sealey*, 2 Atk. 414; *Price v. Trigg*, 10 Leigh 406; *Rogers v. Clark*, 5 Sneed 665; *Phillips's Case*, 19 Ves. 123; *Dyer v. Dyer*, 34 Beav. 504; *Livingston's Case*, 9 Paige 440; *Paul v. York*, 1 Tenn. Ch. 547; *Singleton v. Love*, 1 Head 357. See *Starkweather v. Am. Bible Soc.*, 72 Ill. 50; *May v. May*, 109 Mass. 252, 256.

The proceeds of a lunatic's lands, sold under the direction of a court, are personalty, *Oxenden v. Compton*, 2 Ves. 69, 4 Bro. C. C. 231, 5 Russ. 152; *Batteste v. Maunsell*, L. R. (10 Irish Eq.) 97, 314; *Emerson v. Cutter*, 14 Pick. 108. See *Smith's Case*, L. R. (10 Ch. App.) 79; *Jones v. Green*, L. R. (5 Eq.) 555; *Berry v. Rogers*, 2 B. Mon. 308; *Collins v. Champ*, 15 B. Mon. 118; *Salter v. Salter*, 6 Bush 624; *Armstrong v. Miller*, 6 Ohio 59.

The proceeds of an infant's or lunatic's lands sold by virtue of a private act of the legislature, are real estate, *Snowhill v. Snowhill*, 3 Gr. Ch. 20, 3 C. E. Gr. 350; *Tilghman's Case*, 5 Whart. 44; *Carr v. Ellison*, 2 Bro. C. C. 56; *Thomas v. Pullis*, 56 Mo. 211; *Campbell v. Campbell*, 19 Grant's Ch. 274; *Holland v. Adams*, 3 Gray 188. See *Cudman v. Cadman*, L. R. (13 Eq.) 470.

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THE CHANCELLOR.

The question presented for decision is whether certain money, which was paid into this court in 1871 as the share of Sarah M. Livesey, now deceased (then, and up to the time of her death, a resident of the state of Pennsylvania), of the proceeds of the sale of land in this state, in partition, goes to her next of kin, or to her heirs-at-law. The master has reported that the interest of the money should be paid to her administrator, and the principal to her heirs-at-law *ex parte materna*, the property having been derived by her by descent from that side. She was, with her husband, a party defendant to the suit for partition, but was proceeded against therein as a person of unsound mind who had

The proceeds of an infant's land sold in partition are personalty, *McCune's Appeal*, 65 Pa. St. 450; *Davison v. De Freest*, 3 Sandf. Ch. 456; *Foreman v. Foreman*, 7 Barb. 215; *Pennell's Appeal*, 20 Pa. St. 515; *Scull v. Jernigan*, 2 Dev. & Bat. Eq. 144; *Large's Appeal*, 54 Pa. St. 383; *Steed v. Preece*, L. R. (18 Eq.) 192; *Arnold v. Dixon*, L. R. (19 Eq.) 113; but see *Horton v. McCoy*, 47 N. Y. 21; *Shaffner v. Briggs*, 36 Ind. 55; *Hamer v. Bethea*, 11 S. C. 416; *Allison v. Robinson*, 78 N. C. 222; *Dudley v. Winfield*, Busb. Eq. 91. See also *Wilson v. Duncan*, 44 Miss. 642; *Bateman v. Latham*, 3 Jones Eq. 35; *Shivers v. Latimer*, 20 Ga. 737; or a feme covert's lands, *Biggett v. Biggett*, 7 Watts 563; *Kneeland v. Ensley*, Meigs 620; *Jones v. Walkup*, 5 Sneed 135; *Moore's Case*, 3 Head 171; *Biggett's Estate*, 20 Pa. St. 17; *Mobley's Case*, 2 Rich. Eq. 56; *Vensel's Appeal*, 77 Pa. St. 71; *Hay's Appeal*, 52 Pa. St. 449; *Hammond v. Stier*, 2 G. & J. 81; *State v. Krebs*, 6 H. & J. 31; *Jones v. Plummer*, 20 Md. 416; *Hall v. Short*, 81 N. C. 273. See *Mildmay v. Quick*, L. R. (6 Ch. Div.) 553; 2 Story's Eq. Jur. §§ 1212-1214.

Surplus money arising from lands sold to pay a decedent's debts is land, *Hoev v. Kinney*, 10 Abb. Pr. 400; *Griswold v. Frink*, 22 Ohio St. 79; *Fidler v. Higgins*, 6 C. E. Gr. 138; *Jenny v. Preston*, 13 Sim. 356; *Oberle v. Lerch*, 3 C. E. Gr. 346, 575; *Betts v. Wirt*, 3 Md. Ch. 113; *March v. Berrier*, 6 Ired. Eq. 524; *Cooke v. Dealey*, 22 Beav. 196; *Walker v. Bradbury*, 15 Me. 207; *Read v. Bostick*, 6 Humph. 321; but see *Grider v. McClay*, 11 Serg. & R. 224; *Turnbull v. Turnbull*, MS. 19 Grant's Ch. 258; *Graham v. Dickinson*, 3 Barb. Ch. 169; *Vincent v. Platt*, 5 Harring. 164; *Overdeer v. Updegraff*, 69 Pa. St. 110; *Cronise v. Hardt*, 47 Md. 433; *Pence v. Pence*, 11 Ohio St. 290.

The surplus arising from a sale of lands to satisfy a decedent's mortgage is land, *Dunning v. Ocean Nat. Bank*, 61 N. Y. 497; *Weld v. Tew*, Beatt. 266; *Leeming's Case*, 3 De G. F. & J. 43; *Cox v. McBurney*, 2 Sandf. 561; *Sweezy v. Thayer*, 1 Duer 286; *Morris v. Murgatroyd*, 1 Johns. Ch. 130; *Jones v. Lackland*, 2 Gratt. 81; *Bourne v. Bourne*, 2 Hare 35; *Shaw v. Hoadley*, 8 Blackf. 165. Unless otherwise specified in the mortgage itself, *Varnum v. Meserve*, 8

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not been so declared on commission, and therefore a guardian *ad litem* was appointed for her. Soon after the money was paid into court, her attorney in fact applied at the clerk's office, at her special request, for the money, but payment was refused. She was a monomaniac, and it is testified that on all other subjects except one, galvanism, she was of perfectly sound mind, and that her monomania was paroxysmal. She was never the subject of a commission of lunacy, although she appears to have had quite a large amount of property. In 1871, she was in an asylum for the insane, but from 1878 to the time of her death, which occurred in 1880, she lived in her own house. She survived her husband. It is proved that, after she left the hos-

Allen 160; *Freeman v. Ellis*, 1 H. & M. 758. See *Wright v. Rose*, 1 Sim. & Stu. 323; *Bogert v. Furman*, 10 Paige 496; *Sweezy v. Willis*, 1 Bradf. 463; *Graham v. Dickinson*, 3 Barb. Ch. 180; *Smith v. Smith*, 13 Mich. 258; *Ragland v. Justices*, 10 Ga. 65.

The proceeds of lands condemned under eminent domain proceedings are land, *Cramer's Case*, 1 Sm. & Giff. 32; *Harrop's Case*, 3 Drew. 726; *Turner's Estate*, 5 De G. & Sm. 483; *Ballou v. Ballou*, 78 N. Y. 325; *Platt v. Bright*, 4 Stew. Eq. 84, note; *Simonds v. Simonds*, 112 Mass. 157. See *Midland Counties R. R. v. Oswin*, 1 Coll. 74; *Hawkins's Case*, 13 Sim. 569; *Handy's Case*, 39 Beav. 206; *Emerson v. Cutter*, 14 Pick. 108.

The court may elect for a lunatic. *Marriott's Case*, 2 Moll. 516; *Parsons v. Kinzer*, 3 Lea 342; *Kennedy v. Johnston*, 65 Pa. St. 451. See *Lewis v. Lewis*, 7 Fred. 72; *Haggard v. Benson*, 3 Tenn. Ch. 268; *Robertson v. Stevens*, 1 Fred. Eq. 247; *Ashby v. Pulmer*, 1 Meriv. 286; *Seely v. Jago*, 1 P. Wms. 389; *Turner v. Street*, 2 Rand. 404; *Pratt v. Tulliaferro*, 3 Leigh 419; *Curd v. Bonner*, 4 Coldw. 632; *Taylor v. Taylor*, 10 Hare 475; 2 Scrib. on Dower 471; *Addison v. Bowie*, 2 Bland 606; *McQueen v. McQueen*, 2 Jones Eq. 16; *Weeks v. Weeks*, 77 N. C. 421; *Paddock v. Shields*, 57 Miss. 340; *McElwain's Case*, 29 Ill. 442; *Brown v. Brown*, L. R. (2 Eq.) 481.

Proceedings in partition where one tenant in common is a lunatic, *Moorehead v. Moorehead*, L. R. (2 Irish Eq.) 492; *Halfhide v. Robinson*, L. R. (3 Ch. App.) 373; *Bloomer's Case*, 2 De G. F. & J. 154; *Underhill v. Jackson*, 1 Barb. Ch. 73; *Gorham v. Gorham*, 3 Barb. Ch. 24.

How far chancery will protect the property of a non-resident lunatic, *Armistead's Case*, Amb. 81; *Garnier's Case*, L. R. (13 Eq.) 532; *Miller v. Birdsong*, 7 Bart. 531; *Hartland v. Atcherly*, 7 Beav. 53; *Hardin v. Smith*, 7 B. Mon. 398; *Ganse's Case*, 9 Paige 416; *Taylor's Case*, Id. 611; *Allison v. Campbell*, 1 Dev. & Bat. Eq. 152; *Colah's Case*, 6 Daly 308; *Wing v. Dodge*, 80 Ill. 564; *Clanton v. Wright*, 2 Tenn. Ch. 342; *Stark's Case*, 2 Macn. & C. 174; *Campbell's Case*, 2 Bland 209; *Sturges v. Longworth*, 1 Ohio St. 544; *Driskell v. Hanks*, 18 B. Mon. 855. See *Bradford v. Abend*, 89 Ill. 78.

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pital, she expressed a desire to come to Trenton to get the money, and made arrangements for the purpose just before her death.

The general rule is, that property is transmitted as real or personal, according to the form in which it exists at the time of the death of the owner. In certain cases, property actually existing in one form is, in equity, for the purpose of transmission, held to be in the other; but where the ownership in the property after conversion is or becomes vested in a person having the right to convert it from the one kind to the other, or in one having legal capacity to accept it, who does accept it, or does something to recognize it, or give it character in the shape in

A monomaniac may be a witness, *Coleman v. Com.*, 25 Gratt. 865; *Spittle v. Walton*, L. R. (11 Eq.) 420; *Sarbach v. Jones*, 20 Kan. 497; *Formby v. Wood*, 19 Ga. 581; 1 Whart. Evid. §§ 402, 403. See *Armstrong v. Timmons*, 3 Harring. 342.

How far monomania on another matter affects a contract, *Boyce v. Smith*, 9 Gratt. 704; *Lemon v. Jenkins*, 48 Ga. 313; *Creagh v. Blood*, 8 Irish Eq. 434; *Baker v. Cartwright*, 10 C. B. (N. S.) 124; *Ferguson v. Borrett*, 1 F. & F. 613; *McDonald v. McDonald*, 16 Grant's Ch. 37; *Young v. Young*, 10 Id. 365; *Alston v. Boyd*, 6 Humph. 504; *Gillespie v. Shuliberrier*, 5 Jones 157; *Jacox v. Jacox*, 40 Mich. 473; *Searle v. Galbraith*, 73 Ill. 269; *Carpenter v. Carpenter*, 8 Bush 283; *Hall v. Unger*, 2 Abb. (U. S.) 507; *Staples v. Wellington*, 58 Me. 453; *Burgess v. Pollock*, 53 Iowa 273; *Wiser v. Lockwood*, 42 Vt. 720; *Crouse v. Holman*, 19 Ind. 30; *Dennett v. Dennett*, 44 N. H. 531; *Titcomb v. Vantyle*, 84 Ill. 371; or a tort, *Hornor v. Marshall*, 5 Munf. 460; *Dickinson v. Barber*, 9 Mass. 218; *Yeates v. Reed*, 4 Blackf. 463. See *People v. Francis*, 38 Cal. 183; *Roberts v. State*, 3 Ga. 310; *Kelly's Case*, 3 Sm. & Marsh. 518; or prevents the statute of limitations from running, *Witte v. Gilbert*, 10 Neb. 539; *Wright v. West*, 2 Lea 78; *Clark v. Trail*, 1 Metc. (Ky.) 35; *Oliver v. Berry*, 53 Me. 206; *Oldham v. Oldham*, 5 Jones Eq. 89; *Sanford v. Sanford*, 62 N. Y. 553; *Dicken v. Johnson*, 7 Ga. 484; *Combs v. Beatty*, 3 Bush 613; *Fairweather v. McMonagle*, 6 Allen (N. B.) 297; *Potts v. Hines*, 57 Miss. 735; *Little v. Downing*, 37 N. H. 355; *Dodge v. Cole*, 97 Ill. 338; *Rutherford v. Folger*, Spm. 304.

How far the English statutes, in regard to the control and disposition of lunatics' lands etc. (17 Edw. II. c. 9 and 43 Geo. III. c. 75), have been recognized in this country, see *Berry v. Rogers*, 2 B. Mon. 309; *Latham v. Wiswull*, 2 Ired. Eq. 298; *Latham's Case*, 4 Ired. Eq. 234; *Barker's Case*, 2 Johns. Ch. 237; *Gorham v. Gorham*, 3 Barb. Ch. 37; *Brasher v. Van Cortlandt*, 2 Johns. Ch. 246, 403; *Eckstein's Case*, 1 Pa. L. J. Rep. *139, *141, 1 Pars. Eq. 62, 64; *Lloyd v. Hart*, 2 Pa. St. 478; *Wright's Appeal*, 8 Pa. St. 59; *Salisbury's Case*, 3 Johns. Ch. 348; *Dodge v. Cole*, 97 Ill. 341.—REP.

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which it exists, the doctrine of equitable conversion is not applicable. *Oberle v. Lerch*, 3 C. E. Gr. 346. Whether the doctrine applies here or not, depends on whether the deceased was or was not capable, after the conversion, of converting the property or of accepting the money, or recognizing the property, or giving it character in the shape it then had; in other words, whether she was, from the time of the conversion to her death, of unsound mind, so as to be incapable of managing her estate. As before stated, she was never so declared by virtue of any commission, and it is proved that she was, except on one subject, perfectly sane, and that she sought to get the money, and was indignant that it was kept away from her by having been paid into court. If she was sane at any time after the conversion had been made, and after she was entitled to the money, the doctrine of equitable conversion is not applicable, but the property must go to her legal representatives according to the shape in which it existed at her death: that is, it must be regarded as money for the purpose of transmission. In *The matter of Wharton*, 5 De G. M. & G. 33, where a lunatic's heir had died also a lunatic, and without having elected to take as personalty certain surplus money, the transmission of which to the ancestor as realty was governed by statute, though it was held that the moneys were impressed with the character of realty, it appeared that the heir had never, at any time, been capable of taking the surplus money as personalty. In *Ex parte Flamank*, 1 Sim. (N. S.) 260, the money paid into court by a railway company for land taken under the lands clauses act, from a person who was in a state of mental imbecility, and who continued so till his death, but was not the subject of a commission of lunacy, was, after his death, ordered not to be re-invested in, or considered as land, but to be paid to his personal representatives. In the case in hand, it does not appear that Mrs. Livesey was not capable of managing her estate, and therefore of electing to receive the money as such. On the facts, then, the administrator is entitled to the fund.

D., L. & W. R. R. Co. v. Scranton.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD
COMPANY

v.

SELDEN T. SCRANTON et al.

1. Where the owner of the equity of redemption in mortgaged lands has assigned for the benefit of his creditors, he retains such an interest that he may apply to set aside a sale of the lands under foreclosure, notwithstanding the assignment.

2. In this case, he had made no defence to the foreclosure suit, and in his petition to set aside the sale, claimed, as one ground, that the mortgage was only collateral, and that the principal security for the debt had not been resorted to or exhausted.—*Held*, that that ground was not available to him under the circumstances.

3. The object of the fourth section of the act of 1880 (*P. L. of 1880 p. 255*), is merely to prevent the sacrifice of property at foreclosure sales, so far as it may be done by requiring proof, to the satisfaction of the court, that at the sale the property brought the best price then obtainable for it at a foreclosure sale for cash. The legislature did not intend by it to authorize the court to protect the property from sacrifice by setting aside sales until an adequate price should be obtained for it.

On objections to sheriff's sale and petition to set it aside &c.

Mr. C. Parker, for the petitioner.

Messrs. J. G. Shipman & Son, for complainant.

THE CHANCELLOR.

The petitioner, Selden T. Scranton, seeks to set aside the sheriff's sale of certain tracts of land sold under the execution in this cause, and to that end has, under *Rule 208*, filed objections to the confirmation of the sales, except as to one tract, which, though it was, as he insists, sold for far less than its value, he is willing to let go, seeing that the purchaser is a large creditor of his, and has dealt with him kindly. The tracts in question are

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in Warren county, and are called in the papers the Cummins, the Deats and the Reeder properties. The first is an undivided interest (one-half) in about ninety acres, and was sold for \$5,000; the second is a tract of about one hundred and sixty-five acres, and was sold for \$8,375, and the third is a tract of nineteen and a-half acres, and was sold for \$520. The complainant was the purchaser of all of them. The petitioner insists that the first (the undivided half) is worth \$25,000, the second \$30,000, and the third \$1,500. He gives as a reason why the sale should be set aside, that at the time of the sale the weather was almost, if not quite, the hottest of the season, and that various persons whom he requested to attend the sale, while they expressed their willingness to attend, yet declared their inability to do so; one because of sickness, and others because of the weather and their intended absence at watering-places. He further urges that the Cummins and Deats properties, in which are minerals, it is said, are likely to be greatly benefited by railroads now being constructed in their neighborhood, which will furnish valuable and necessary facilities of communication with the iron market. He also asks relief, on the ground that the mortgage was given only as collateral security, and that, in equity, no sale should be made under it until after the principal security has been exhausted. The complainant objects to the petition and moves to dismiss it, on the ground that the petitioner, who has made an assignment (made before the bill was filed) for the benefit of his creditors, has, therefore, no interest in the sales, and cannot be heard to object to them, or oppose the confirmation thereof, and insists that the sales should stand.

To dispose of the objection on the ground of want of interest. The petitioner is a party to the suit, and, under his assignment for the benefit of his creditors, has such an interest in the sale of the property as gives him a right to be heard. He is entitled to any surplus of his property assigned that may remain after the payment of his debts; and on payment of his debts before administration of his estate by the assignee, he would be entitled to the assignment of his property.

The objections to the sales, however, are not such as to warrant

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me in withholding confirmation. The sales were conducted with great fairness. The sheriff appears to have granted the petitioner every adjournment which he asked for. When the sales were made, there was no lack of bidders, and the petitioner, who was present, complained of none; nor did he object to the sale, or ask for a postponement on any ground whatever. The time occupied in the sale appears to have been nearly three hours. The sheriff testifies that he received the execution in September, 1880; that he proceeded to advertise the land described in it; that two adjournments were granted at the request of the petitioner, and, by consent of parties, two or three more; that he sold the property and reported the sale, but understood that it was set aside on exceptions; that about the middle of April, 1881, an order directing a resale was served on him, and he immediately advertised the property to be sold on the 24th of June then next; that on that day the petitioner urgently pressed for an adjournment, but gave no particular reason therefor; that the complainants opposed it, but he granted it for four weeks, until July 22d, on which day the petitioner asked for another, which was granted and the sale adjourned to the 20th of August; that on that day the petitioner appeared and with him Mr. Charles Scranton, Mr. Moffatt, the agent of Ario Pardee, and another gentleman, named Trethaway, who was engaged in mining, and was an agent of Mr. Pardee; that there were also present, not only when the sale began, but all the afternoon, during the whole time the sale continued, Mr. Theodore Sturgis, the agent of Mr. Benjamin G. Clark, the assignee of the petitioner and of S. T. Scranton & Co., Mr. William H. Scranton, who is the nephew of the petitioner, and who has charge of the furnace and property of the assignee at Oxford, and other persons; that after due time, and at about two o'clock in the afternoon, he (the sheriff) proceeded to sell the land, beginning with the first lot; that the petitioner made no request for any adjournment, at any time, either before or during the sale, nor did he make any representation to the sheriff as to the non-attendance of any other person, or say that he had requested any one else to be present who had not come, but he appeared

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to be entirely ready for the sale; that Charles Scranton bid on each of the lots; that the petitioner seemed to be interested in the bidding, and consulted with his brother and others who were present during the sale; that the sheriff was occupied all the afternoon, from shortly after two o'clock until nearly five, in selling the property; that he delayed in crying off each tract until he was satisfied that no more would be bid; that he repeatedly spoke to the petitioner and Charles Scranton, to ascertain whether they had finished bidding, and the latter would either continue to bid or say that they were through, and that neither the petitioner nor Charles Scranton, nor any one else, said anything by way of objection to the amount bid, nor did he or they say that the lots were worth more or less than the amount for which they were struck off. He further says that he took every bid that was offered that day, and that each lot was struck off and sold in the presence of all the before-mentioned persons, and that he believes that there can be no fairer sale of real estate than was then made of the property in question. He also testifies that the property was sold for the best and highest price it would bring, in cash, at the time, and there is no evidence at all to the contrary.

In this connection, it may be stated as a significant fact that the property sold to Pardee, which the petitioner values at about \$50,000, was struck off to him at \$26,710, subject to an encumbrance of \$5,600. . Before the passage of the act "concerning proceedings on bonds and mortgages given for the same indebtedness, and the foreclosure and sale of mortgaged premises thereunder" (*P. L. of 1880 p. 255*), it had been repeatedly held in this court that it would not interfere with a sale under its decree, on the ground of mere inadequacy of price, unless the price was so inadequate that the court might infer fraud from the inadequacy. *Eberhart v. Gilchrist*, 3 *Stock*. 167, 170. And the English practice of opening biddings had not been adopted by our courts, because its tendency was considered prejudicial to judicial sales. *Conover v. Walling*, 2 *McCart*. 173, 178, 179. It is urged, however, that the act of 1880, above referred to, has introduced a practice as to sales under foreclosure akin to

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the English practice of opening biddings, because it makes it necessary to the validity of such sales, that they be confirmed. But that act, while it indeed makes confirmation necessary, imposes no condition, except that it must appear, by proof, that the property has been sold at the highest and best price it would bring at the time of the sale, in cash—that is, that it has brought the best price that could be got for it at the time, at sheriff's sale, for cash. The design of the legislature in requiring judicial action on every such sale, was not that, through the setting aside of sales, mortgaged property might be saved from effectual sale until an adequate price for it should have been obtained, but that those interested in having the property well sold might have opportunity to object to the sale; and if it should appear that the property had not brought the highest price it would bring at sheriff's sale, for cash, the sale might be set aside. There is no evidence that a better price could have been got for any of the properties in question. Nor is any person produced who says that if it had not been for the heat of the weather, or other impediment, he would have attended the sale, and given more; nor any one who says that, on a resale, he would give more; nor even that the property would probably bring more at another such sale, for cash. And there is not even any assurance that if the sales be set aside, the properties will bring as much on a resale. The petitioner's witnesses speak of the value of the properties, but not of what they would probably bring at sheriff's sale for cash. The railroad was in course of construction when the sale took place, and it is not yet completed. It does not appear that any new discovery as to the existence of minerals in the land, or the character of those known to be there, has been made since the sale. There is no proof at all as to the Reeder lot, except an opinion as to its value. As to the Cummins and Deats properties, Prof. Cook testifies that both of them have long been known to contain valuable deposits of iron ore.

But further, the amount due the complainant on the execution, at the time of sale, was about \$400,000, and on the Deats lot there was a first mortgage, on which, at that time, there was

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due about the sum of \$700. The mortgagors are all insolvent, and so is the Oxford Iron Company, for whose accommodation, and as surety for which the mortgage indebtedness was, as the petitioner alleges, incurred. The value of the three tracts in question, according to the petitioner's estimate, is about \$56,500. The other tract which was bought by Pardee, brought, as before mentioned, \$26,710. So that if, on a resale, the property should bring the prices fixed by the petitioner, it would not pay one-quarter of the complainant's debt.

The petitioner made no defence at all in the suit. For obvious reasons, he cannot obtain relief in this proceeding on the ground that, in equity, he is entitled to have the principal security exhausted before recourse is had to his mortgage. The petition will be dismissed, and the sale confirmed, with costs.

PHEBE A. WOOD

v.

FRANCIS R. CONDIT et ux.

A mortgage was given by a son to his father, in order, as the father testified, "to accommodate him financially—to do what he pleased with it."—*Held*, that an absolute assignment of it to complainant, to satisfy in part a former decree which he had obtained against the father, was not a misappropriation.

Bill to foreclose. On final hearing on pleadings and proofs.

Mr. J. H. Neighbour, for complainant.

Mr. J. Whitehead, for defendants.

THE CHANCELLOR.

The bill is filed to foreclose a mortgage for \$1,500, dated April 17th, 1876, payable in one year, with interest, on land in Essex

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county. The mortgage was given by Francis R. Condit and wife to Israel D. Condit, ~~jun.~~^{sen.} by whom it was assigned to the complainant, April 13th, 1878. The consideration expressed in the assignment is \$1,500. The answer sets up as defences want of consideration for the making of the mortgage and usury, and it insists that if the mortgage has any validity at all, it is only valid and enforceable to the amount of \$1,000 and interest, which sum, the defendants say, was the consideration of the assignment. It appears by the proof that the mortgage was made at the request and for the accommodation of Israel D. Condit, sen., the mortgagor's father, to assist him financially, and to that end to be used as he might see fit. The complainant, on the 8th of April, 1878, had a decree for foreclosure and sale, obtained upon a mortgage given by Israel D. Condit, sen., and his wife, upon the real property of the latter, and also a judgment against both, upon the bond to secure the payment of which the last-mentioned mortgage was made. There was then due on the decree and judgment the sum of \$1,952.06. Under an execution on the judgment, the sheriff of Essex county had, according to the statements of the answer, levied upon all the real and personal property of Condit and his wife, the defendants therein, and had advertised it for sale. To save the property from sale, Israel D. Condit, sen., proposed to satisfy the complainant for the decree and judgment by causing the mortgage now in suit to be assigned to her for part of the money and paying the rest in cash, which was agreed to, and the mortgage assigned and money paid. The mortgage, though made in favor of Israel D. Condit, jun., was, as before stated, given to Israel D. Condit, sen. He says it was given to him "to accommodate him financially—to do what he pleased with it." When he used it by transferring it to the complainant for his relief from the decree and judgment, he did not misuse it. Moreover he informed the mortgagor, at that time, of the use he had made of it, and the latter made no objection. The mortgage is a perfectly valid security in the hands of the complainant. *Farnum v. Burnett*, 6 C. E. Gr. 87. The mortgagor, in his answer, claims, as before stated, that if the mortgage has any validity, it cannot be for more than \$1,000 and

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interest ; but the mortgage was not taken as security—it was taken in payment. According to the testimony of Israel D. Condit, sen., it was taken for \$1,000; but, on the other hand, the complainant's attorney testifies that it was taken for \$1,500, and the consideration expressed in the assignment is corroborative of his statement. According to all the evidence on the subject the mortgage was sold to the complainant, and she is entitled to recover the full amount due on it according to its terms.

It will not be out of place to remark that the defence of usury is not sufficiently pleaded ; and if it were, there is no proof to sustain it, nor any ground for such defence. The answer itself states that the mortgage was taken in part payment of the money due on the decree and judgment. There will be a decree for the complainant in accordance with these views.

ADAM FRITZ

v.

JOHN SIMPSON.

A bill to redeem a past-due mortgage, and for an account of the rents and profits of the premises during the mortgagee's possession, and for a discovery as to the present holder of the mortgage, was filed by the mortgagor. On demurrer—*Held*, that complainant was entitled to the account sought, but not to redeem ; it appearing by the mortgagee's answer that he had assigned the mortgage to a person whom he mentioned. But, a tender of the amount due on the mortgage having been made to the mortgagee before the filing of the bill, held, also, that such tender bound the assignee of the mortgage so far as interest thenceforward was concerned, since he had neglected to have his assignment recorded, and the mortgagee, on inquiry at the time of the tender, refused to divulge his name, and the mortgagor had no notice of the assignment. The cause was directed to stand over to enable the mortgagor to bring in the assignee.

Bill to redeem. On final hearing on bill and answer.

Fritz v. Simpson.

Mr. W. B. Maxson and Mr. F. Bergen, for the complainant.

Mr. R. V. Lindabury, for the defendant.

THE CHANCELLOR.

The bill is filed by the owner of the mortgaged premises against the mortgagee, to redeem the mortgage, which is past due. It prays a discovery as to who is the holder of the mortgage, if it has been assigned, and an account of the rents and profits of the premises since they have been in the possession of the mortgagee, who, according to the bill, took possession of them as mortgagee, and let them to the mortgagor after the latter had ceased to own the property. The bill states that a tender was made to the mortgagee, on behalf of the complainant, before the filing of the bill, of the full amount of principal and interest due at the time on the mortgage, but that he refused to receive it, saying that he had not the mortgage, but had assigned it, and he refused to state to whom he had assigned it. The answer states that on the 2d of May, 1881 (the tender was made in July of that year), the defendant assigned the mortgage to Samuel M. Smith. It does not deny that the tender was made and refused, nor that the defendant refused to state to whom he had assigned the mortgage, but is silent on those subjects. It denies, by way of demurrer, the complainant's right to an account and to a decree for redemption against the mortgagee. The demurrer is not well taken. The complainant is entitled to an account from the mortgagee of the rents and profits during the time the latter held the mortgage, and is also entitled to redeem the mortgage as against the holder thereof. Up to the time of filing the answer, it did not appear but that the defendant was the holder. By virtue of the provisions of the thirty-fourth section of the act concerning mortgages (*Rev. 708*), payment to the mortgagee, in good faith, and without notice of the assignment, the assignment being unrecorded, would have satisfied the mortgage. And inasmuch as the assignee in this case did not cause his assignment to be recorded, the effect of the tender, if made in good faith and without notice of the assignment, will be to stop the interest

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from the time when the tender was made. The complainant insists that he is entitled to a decree of redemption against the defendant, and he cites the case of *Mitchell v. Burnham*, 44 Me. 286, in which it was held that where an assignment of mortgage has not been recorded nor any notice of it given, tender may be well made and notice to account given to, and a bill to redeem maintained against, the mortgagee. In that case the tender was accepted by the mortgagee, however, and the alleged assignee (there does not appear to have been any assignment in fact) was made a party to the bill. The owner of the equity of redemption cannot be deprived of his right to redeem the mortgage by means of secret assignments. Nor will the court permit the holders of the mortgage to frustrate or baffle him by such means in his efforts to that end. So soon as it appears necessary to do so in order to protect the owner of the property against bad faith in the matter, the court will order that the money be paid into court (in this case it was, according to the bill, paid in on the filing of the bill), and that the mortgage be canceled. The cause will stand over, without costs, with leave to the complainant to file a supplemental bill to bring in Smith and the defendant; the mortgagee will be ordered to answer further, giving the account prayed for, and otherwise completing his answer to the bill.

THE OCEAN BEACH ASSOCIATION et al.

v.

ANDREWETTA S. BRINLEY.

1. Dower, when founded on a legal seizin, is a pure legal right, and while courts of equity have concurrent jurisdiction with courts of law of suits for dower, yet, when no equitable principle is involved, they govern themselves by the same rules which control courts of law.

2. In such cases, a court of equity will not try a question of legal title; if the dowress comes to equity, in the first instance, for a remedy, and the de-

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defendant denies her legal right, equity will defer giving her relief until the question of title is determined at law.

3. If A agrees with B to purchase land for him, and have it conveyed to him, so that A is not the vendor, but a mere intermediary between the vendor and B, and A afterwards takes title in his own name, he will hold the land as trustee of B, and A's widow will not, in equity, be entitled to dower.

4. But, in such case, B can only defend successfully by resorting to the aid of a court of equity.

5. The first requisite of a good custom is that it shall have been used so long that the memory of man runneth not to the contrary; customs, therefore, like those of gavelkind and borough-English, cannot prevail here, for they cannot have the requisite antiquity to give them validity.

6. Common error sometimes passes as law, but no error can be raised to that dignity until it has been declared to be law by a judicial tribunal of superior jurisdiction, and is afterwards so far adopted as law, in practice, as to render a return to the true rule of law destructive of existing interests.

On motion for an injunction, heard on bill and affidavits and answer and affidavit.

Mr. John H. Stewart and Mr. Barker Gummere, for complainants.

Mr. Cortlandt Parker, for defendant.

VAN FLEET, V. C.

The object of the bill in this case is to have the defendant restrained from further prosecuting certain actions at law, which she has brought against the complainants to recover dower in certain lands, which, during coverture, were conveyed by her husband, by a deed in which she did not join, to seven persons under whom the complainants claim. The grounds mentioned in the bill, upon which the interference of the court is asked, are very numerous, but only two or three of them, in my judgment, possess sufficient substance to merit either consideration or mention.

Dower, when founded on a legal seizin, is a pure legal right, and while courts of equity possess concurrent jurisdiction with courts of law for its enforcement, yet, in cases where no equitable

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principle is involved, they uniformly treat the widow's dower as a strictly legal right, and, in dealing with it, govern themselves by the same principles which control courts of law. *Scrib. on Dow.* 153. So strict are they in adhering to this course of procedure, that it may be said to be their invariable rule that, even in cases where the dowress comes, in the first instance, to them for a remedy, if her right, as a matter of law, is denied, relief will be deferred until her legal right has been vindicated by a judgment at law. *Hartshorne v. Hartshorne*, 1 Gr. Ch. 349; *Swaine v. Perine*, 5 Johns. Ch. 482; *Badgley v. Bruce*, 4 Paige 98; *D'Arcy v. Blake*, 2 Sch. & Lef. 387; *Rockwell v. Morgan*, 2 Beas. 384.

Chancellor Green, in the case last cited, said :

"This court clearly cannot try or decide a question of legal title, nor decide whether a widow is legally entitled to dower when her legal right is denied. If the defendant denies the complainant's right to dower, the question must be tried at law."

The main ground upon which the complainants base their right to an injunction is, that the defendant's husband was never seized of any estate or interest in the lands in controversy, in his own right, but acquired title to them for the use and benefit of the persons under whom they claim, and held them simply as their trustee. If this contention is found to be true, it must be conceded that the defendant is not entitled to dower; for I think there can be no doubt about the soundness of this proposition: that if A agrees with B to purchase land for him, and have it conveyed to him, so that A is not the vendor, but a mere intermediary between the vendor and B, and A afterwards takes title in his own name, that he holds the land as the trustee of B, and that A's widow will not be entitled to dower, according to well-settled rules of equity. I think it must also be conceded that in such case, B's defence to an action at law by A's widow could only be successfully made in equity. The soundness of the principles upon which the complainants found their right to an injunction must be admitted, and the court need, therefore, concern itself with nothing but the question of fact.

Ocean Beach Association v. Brinley.

The lands in controversy were held by the proprietors of the eastern division of New Jersey, as part of their joint property, up until December 2d, 1861. The answer avers that on that date a return was made to the surveyor-general, showing that they had been surveyed for Edward Brinley, under a warrant issued May 17th, 1859, authorizing him to locate and have set off to him, in severalty, seven thousand acres of the common property. This return was duly recorded in the office of the surveyor-general, at Perth Amboy, April 24th, 1862, and is the only return or survey of the lands in controversy now shown to be in existence. Edward Brinley was the husband of the defendant, and it is upon his seizin she founds her claim of dower. He died intestate February 14th, 1867. His father, Francis W. Brinley, was a member of the council of proprietors of the eastern division of New Jersey, and also their surveyor-general. He died May 1st, 1859. Edward afterwards took his place in the council of proprietors.

It is quite impossible to deal intelligently with the facts of this case without first understanding the method by which lands held by the proprietors were partitioned. That proceeding is thus described by Chief-Justice Kirkpatrick, in *Arnold v. Mundy*, 1 Hal. 1, 67 :

"The proprietors of East Jersey are tenants in common of the soil ; their mode of severing this common estate is by issuing warrants, from time to time, to the several proprietors, according to their respective rights, authorizing them to survey and appropriate, in severalty, the quantities therein contained. Such warrant does not convey a title to the proprietor ; he had that before ; it only authorizes him to sever so much from the common stock, and when so severed by the proper officer it operates as a release to him for so much. This is the case when the proprietor locates for himself. When he sells his warrant to another, that other becomes a tenant in common with all the proprietors *pro tanto*, and in the same manner he proceeds to convert his common into a several right. Regularly there is a deed of conveyance, upon the transfer of this warrant, for so much of the common property, and that deed and the survey upon the warrant is the title of the transferee."

Judge Elmer, in his valuable note on the sources of title to land in this state, appended to the act making provision for the safe keeping of the records of the surveyor-general's office (*Nix.*

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Dig. 935), gives substantially the same description of the method of procedure. He says :

"Titles in West Jersey [and he subsequently states the same course was pursued in East Jersey] are derived from some one of the original proprietors. Regular deeds of conveyance were made (formerly by lease and release, in modern times by deeds of bargain and sale) either of a fractional part or of a specified number of acres. A proprietor, or a grantee under him, upon presenting his title to the council, obtains an order for a warrant, which is signed by the clerk and recorded, and which authorizes the surveyor-general or his deputy to survey a specified number of acres from any of the unappropriated lands. By virtue of this warrant, a deputy surveyor, who is a sworn officer, runs out a survey including any number of acres not exceeding the number specified, as the owner chooses to have it, wherever it is supposed other surveys do not cover the ground. The deputy having returned his survey, reciting the warrant and the deductions of the title, with a map, he certifies it to the council, and being by them inspected and approved, it is ordered to be recorded."

These citations show very clearly in what manner the proprietary lands were held originally, and the course which must be pursued to acquire title to them.

The complainants claim title under four fishermen, named as follows: John Brown, Isaac Newman, Garret S. Newman and Stephen Bennet. Three of these persons have made affidavits in this case—the fourth is dead—and their story presents the first ground upon which the complainants rest their claim to an injunction. They say, some time between 1850 and 1855, Annaniah Gifford, a deputy surveyor of the council of proprietors, was surveying land in the neighborhood in which they lived; that they made inquiry of him at what price land could be obtained of the proprietors; two say he replied that they could get it at \$1 an acre, but the other says he said \$1.25 an acre; they then say they requested Gifford to survey the lands for them, and that he did so. One says Gifford told them, when the survey was completed, or shortly afterwards, that the survey embraced ninety-one or ninety-two acres; another says that he thinks the survey embraced about seventy-five acres, and the third says he does not remember how many acres it embraced. They further say that after the survey was completed, they told

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Gifford to take up the land for them, and to do whatever was necessary to get the title of the proprietors. One says that Gifford kept the survey; another, that they told Gifford to send it to the surveyor-general; and the third, that he does not know what was done with it. They took possession, they say, shortly after the survey was made, by direction of Gifford, and made some improvements on the land, but they admit they were accustomed to spread their nets on the land before the survey was made. Isaac Newman says that Gifford told him some time after the survey had been made, that the survey had been altered at the office by the addition of ten or twelve acres.

Affairs seem to have remained in this condition until 1859. John Brown says, some time after the survey was made—he does not attempt to fix the time with any greater certainty—Gifford again came to their neighborhood to survey, and he then told them that old Mr. Brinley wanted them to make a payment on the land, and they gave him \$35, for which he subsequently brought them a receipt. This receipt is set out in the bill, and is in these words :

“FREEHOLD, December 2, 1859.

“Received in part payment for a tract of land of A 92 in Wall township, on the ocean, \$35.

EDWARD BRINLEY.”

They say the next thing they heard was that old Mr. Brinley was dead, and that the matter had fallen into somebody's else hands, but whose they do not remember.

It is perhaps important to remark just here, that Francis W. Brinley, the person called old Mr. Brinley, died May 1st, 1859, some seven months before the date of this receipt. It is quite probable, therefore, that information of his death had reached these persons before they made this payment. That payment seems to have been made very soon after they were informed it was required. Gifford was in their neighborhood surveying when he notified them it was required. They say they raised \$35 and gave it to him. The inference is almost unavoidable that they gave him the money while he was there in their neighborhood on that occasion. Unless we presume that Gifford

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withheld the money from the person entitled to it for over seven months after he received it, it is impossible to believe that these persons were not informed of Francis W. Brinley's death before they made the payment of \$35. No such presumption can be made in the face of the character these fishermen have ascribed to Mr. Gifford.

But to resume. They further say that, shortly after Gifford told them that old Mr. Brinley was dead, he informed them that another payment was required; he did not say by whom it was required, but they supposed by some one of the proprietors. The money was raised, and Gifford and Stephen Bennet carried it to Freehold and paid it to Edward Brinley. A receipt for it was written on the same paper containing the receipt dated December 2d, 1859, and read as follows:

"FREEHOLD, September 4, 1860.

"Received on the above from Mr. A. Gifford, \$77.

"EDWARD BRINLEY."

The next thing they remember, they say, is a letter written by Edward Brinley, requesting them to meet him at Freehold and to pay the balance of the purchase money and get their deed. John Brown and Isaac Newman met Brinley at Freehold. Brown says they said to Brinley that they had expected to get the land for \$1.25 an acre, as Gifford had told them they could get it of the proprietors for that price; to which Brinley replied that land had gone up, and was then worth \$3 an acre; but, inasmuch as they had had their survey made some time before, he would let them have it for \$2.50 an acre; while Newman says he asked Brinley how it was that he charged them \$2.50 an acre, when Gifford had told them they could take up the land for \$1 an acre, and that Brinley replied that land had gone up since he had located that which they were getting. They then paid Brinley the balance of the purchase-money and he delivered to them a deed, executed by himself alone, bearing date December 12th, 1861. The deed contains this important covenant, namely, that the land conveyed by it had been duly

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located on a proprietary right of location, which Brinley bound himself to forever defend.

It is clear that the court can extend no aid to the complainants unless the facts thus adduced show clearly and satisfactorily that Edward Brinley held the lands in question, not in his own right, but as trustee. Their effort is to show a trust by proof of a parol contract made more than twenty-five years ago, and this they attempt to do, in spite of the fact that almost every writing made by the alleged trustee, in relation to the subject of the trust, denies the trust. The deduction they seek to have made from the narrative of the three fishermen is, that at some time between 1850 and 1855, Brown, the two Newmans and Bennet made and completed with Francis W. Brinley a contract for the purchase of the lands in controversy, and that Edward Brinley subsequently obtained title to the lands with notice of the rights of the prior purchasers. Unless such prior contract has been established, by convincing legal proof, there is no pretext for the claim of trust set up by the complainants. It is undoubtedly true that as soon as an agreement for the sale of land is made, the vendor becomes the trustee of the legal estate for the vendee, and the vendee is put in a reciprocal position in respect to the purchase merely, and if the vendor subsequently conveys the land to some other person than his *cestui que trust*, with notice of the prior contract, such person will take subject to the trust existing in favor of the first purchaser, and may be compelled to convey to him. Now, has a contract with Francis W. Brinley been proved? I think not. I think it is very clear that the only contract the fishermen ever made concerning the lands was made with Edward W. Brinley. That is what the receipts and deed say. The evidence they give is much more trustworthy than mere human recollection, which time obscures, interest warps and age obliterates. Now, what is proved? I think there is no reason to doubt that the four fishermen had Gifford to make a survey, but not of all the lands in controversy. His survey was, however, wholly unauthorized. He had no warrant. Without that, he could not act for the proprietors. I think it is also true that the fishermen requested Gifford to take up some

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lands for them, but I am also convinced that he informed them at the same time, that in order to make the survey of any avail to them, they must purchase a proprietary right and procure a warrant to locate.

Even if it be conceded that Gifford's survey was delivered to the surveyor-general, we do not advance a step towards showing a contract. Until the fishermen were the owners of a proprietary right and were armed with a warrant to locate, a survey of these lands could have no more force as proof of a contract of purchase, than a survey of any of their neighbor's lands. And even if it be admitted that Francis W. Brinley directed Gifford to tell the fishermen that he wanted them to make a payment on the land, still that, standing alone, does not prove a contract. He may have known that they had had the land surveyed, and had expressed a wish to purchase, but they had proceeded no further. They had suffered four or more years to elapse without doing anything more. I do not regard their possession as a matter of much consequence. I think they enjoyed the use of the land quite as much before the survey as afterwards. In this condition of affairs, Mr. Brinley may have thought it but just to warn them that if they desired to purchase they must do something besides express a wish. The uncertainty overhanging the date of the survey—it will be observed it has been left to oscillate anywhere between 1850 and 1855—and then the long lapse between the date of the survey and the time of the first payment, tend very strongly, I think, to show that neither party thought or understood it was bound in any way to the other.

So far, the declarations which the three fishermen have put in Gifford's mouth, have been treated as competent evidence, but it is manifest they are not. He was a deputy surveyor, and as such had authority to survey unappropriated lands under warrants issued by the council of proprietors, but he was neither officer nor agent for any other purpose. He had no authority to make contracts for the council of proprietors, nor for any of their members. At least no such authority is shown. His declarations, therefore, were mere hearsay, possessing absolutely no force whatever as evidence. Expelling from the complainants' case this species of proof, there is nothing left which will justify even

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a conjecture that a contract existed between Francis W. Brinley and the fishermen.

The second ground upon which the complainants insist that they are entitled to the aid of the court is that, by a long-established and universally-recognized custom, the widow of a proprietor is not entitled to dower in lands held by him in severalty under the council of proprietors. The citations already made show that a survey duly made under a warrant to locate, returned and recorded, operates as a release, and effects a complete severance of the lands surveyed from the common stock. The third section of the act of 1787 declares that after a survey has been duly entered of record, in the proper office, it shall preclude and forever bar the proprietors and their successors from any demand on the lands therein embraced, any plea of deficiency of right or otherwise notwithstanding. *Rev. 599.* An investiture of title effected by warrant, survey and return entered of record would seem to be as perfect as law can make it. A proprietor, holding land by a title thus created, is unquestionably seized of an estate of inheritance therein, and his widow, by the plain letter of the statute, is dowable thereof. It is not debatable that the custom avouched by the complainants stands in direct conflict with our statute. That enacts that a widow shall be endowed of the third part of all lands whereof her husband, or any other to his use, was seized of an estate of inheritance, at any time during coverture, to which she has not released her right. So far as I am aware, no trace of this custom can be found in either the legislation or judicial decisions of this state. It is not pretended that it has ever been recognized, directly or indirectly, by either the judiciary or legislature. An attempt has been made to prove it by proof of common understanding and the practice of conveyancers. One gentleman swears that he has examined the record of over five hundred deeds recorded in Monmouth county, made by three different proprietors, for lands held by them in severalty, and found but one instance in which a wife had joined in making title. Whether they all had wives at the several times when these deeds were made, he does not know; but he does state that it was the common understanding among surveyors and persons

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engaged in real estate transactions, that the signature of the wife was not necessary to pass lands held by a proprietor, free of dower. Another gentleman, who says he has been a deputy surveyor since 1843, swears that it has never been considered that the wife of a proprietor was entitled to dower in the lands which her husband held in severalty, under the council of proprietors, and that he has never known an instance in which the wife of a proprietor has joined in a conveyance of such lands. This is the whole of the evidence offered to prove this custom. It is hardly necessary to say that it is utterly insufficient. The first requisite of a good custom is that it shall have been used so long that the memory of man runneth not to the contrary. For which reason no custom can prevail against an express act of parliament, since the statute itself is a proof of a time when such custom did not exist. 1 *Blk. Com.* 76; *Bac. Abr. tit. "Custom"* A. Customs similar to those of gavelkind and borough-English, cannot exist here, for they cannot have the antiquity necessary to their validity. To be recognized by the courts, they must have existed immemorially, that is, before the beginning of the reign of Richard the First. This country was not discovered until more than three hundred years after the commencement of that sovereign's reign, and consequently no custom can have existed here for the period required to make it legal. *Ackerman v. Shelp*, 3 *Hal.* 125; *Allen v. Stevens*, 5 *Dutch.* 509.

But the complainants insist that if the practice cannot have effect as a custom, it should nevertheless be held effectual to bar the defendant's claim in virtue of the maxim, *communis error facit jus*. This, though an admitted legal maxim, is seldom applied in the administration of justice, and never without the utmost caution. The reason is obvious; it permits a misconception to become law in destruction of the real law of the case. In my judgment, no error should be allowed to possess that degree of dignity and force until it has been sanctioned by a tribunal of superior jurisdiction, and subsequently treated as law in the actual business affairs of men. The true rule I believe to be this: That no error is entitled to

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be accepted as law by the courts, until it has been declared to be law by a competent judicial decision, and afterwards so far adopted in practice that a return to the true law would seriously impair existing interests. In *O'Connell v. Queen*, 11 Cl. & Fin. 373, Lord Denman said :

"When, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain, and has often been proved by recent experience, that the mere statement and restatement of a doctrine—the mere repetition of the *cantilena* of lawyers—cannot make it law if it be irreconcilable with some clear legal principle."

And Lord Brougham, in *De Vaynes v. Noble*, 2 Russ. & Myl. 506, said :

"Common or universal error may be said to make the law, especially if the opinion of lawyers and the decisions of judges have been ruled by it."

Justice Blackburn says, in *Jones v. Tapling*, 12 C. B. (N. S.) 846 :

"There are cases in which a decision originally erroneous, has been so long acquiesced in and acted on, that a return to the proper principle would greatly affect existing interests. This is peculiarly the case in questions of conveyancing law. In such cases the maxim *communis error facit jus* may be applied."

The error approved in *Morecock v. Dickens*, Amb. 678, was one that had been sanctioned by a prior adjudication. So, too, in *D'Arcy v. Blake*, 2 Sch. & Lef. 387, the error approved by Lord Redesdale was one which prior decisions had made law. He said :

"The decisions to the full extent are so old, so strong and so numerous, so adopted in every book on the subject, and so considered as settled law, that it would be very wrong to attempt, at this time, to alter them."

In my opinion, there is no evidence whatever, in this case, that the error which the complainants insist shall have the force of law, has ever been recognized or applied by any authority competent to give it the force of law.

A third ground on which the interference of this court is asked, is, that full and complete justice cannot be obtained at law. The complainants say that in consequence of the division

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of the lands in controversy into many small parcels, and the conveyance of many of them to different persons, and the fact that many of the tracts so conveyed have been improved by the erection of costly dwellings and large expenditures for ornamentation, equities have arisen in favor of the persons making these outlays which a common law court can neither recognize nor protect. Whether or not the bill avers these equities with sufficient certainty to present a case for relief, is a question which I think should not be considered at this time. The defendant's right to dower has not yet been adjudicated. Her right is not admitted; on the contrary, the complainants deny her right. Her claim is based on a legal right. She has a right to choose the forum which shall determine her legal right. After her right to dower has been established at law, if it should appear that its enforcement according to legal methods will be attended with serious injustice, it may then be the duty of this court, upon a proper case being presented, to consider whether or not equitable relief can be given. But at this juncture it is clear to my mind that this court ought not to pass upon that question.

I am of opinion the case presents no ground for the interference of this court. An injunction must therefore be denied, and the order to show cause discharged, with costs.

RECEIVER OF THE STATE BANK AT NEW BRUNSWICK

v.

THE FIRST NATIONAL BANK OF PLAINFIELD.

1. A transfer of title, by operation of law, can only be effected within the limits of the territory where the law prevails; and, as the laws of a state have no extra-territorial force, it follows that the title to property located in one state cannot be passed by force of the laws of another, except in virtue of the comity or courtesy which prevails among different nations and states by force of international law.

2. No state is bound to give effect to the law of a foreign state when, to do

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so, will prejudice either the rights of its citizens or the interests of the state; but where a transfer of property is valid by the *lex loci*, no just rule of comity requires the courts of the state where the property happens to be located, to adjudge such transfer to be invalid at the instance of citizens of other states, simply on the ground that it is incompatible with its laws.

3. A debtor cannot discharge his liability to his creditor by seeking some person whom his creditor happens to owe, and paying his debt to him.

4. Suit by receiver of an insolvent bank to recover moneys of the bank received by one of its creditors, subsequently to his appointment.—*Held*, that the complainant could have no relief by petition, but only by bill, and that the fact of his being an officer of the court entitled him to no privilege not accorded to other suitors.

On petition, answer and proofs taken in open court.

Mr. A. V. Schenck, for receiver.

Mr. E. W. Runyon and *Mr. B. Williamson*, for defendant.

VAN FLEET, V. C.

The following summary exhibits all the facts material to the controversy in this case: On the 31st of March, 1877, a petition was filed against the State Bank at New Brunswick, for the purpose of having it declared an insolvent corporation, and put in process of being wound up. On the same day, an injunction was granted, restraining the bank from exercising any of its franchises, and enjoining its officers from collecting any of its choses in action, or making any disposition of its property. The writ was duly served on the 2d of April following, and the next day the petitioner was appointed receiver. On the day the petition was filed, the State Bank owed the defendant (the First National Bank of Plainfield) about \$4,500. The defendant was one of the correspondents of the State Bank, and, on the 9th and 10th of April, 1877, collected, on commercial paper theretofore forwarded to it by the State Bank, \$470.30. This sum was not credited on the balance due on the 31st of March, 1877, from the State Bank to the defendant, but still stands to the credit of the State Bank on the books of the defendant. The National Park Bank, of the city of New York, was also a cor-

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respondent of the State Bank, and, on the day the petition was filed, was indebted to the State Bank a trifle over \$13,000. The defendant heard, on the 2d of April, 1877, that the State Bank had failed; and on the same day it learned that the National Park Bank owed the State Bank a considerable sum of money. The defendant at once procured proceedings to be instituted in the Supreme Court of New York for the recovery of its debt. The method it pursued was this: On the 3d of April, 1877, it assigned its claim to a citizen of New York, and he, on the next day, at the instance of the defendant, brought an action in the Supreme Court of New York against the State Bank, and judgment was entered therein on the 21st of July, 1877. The judgment so recovered was subsequently paid by the National Park Bank, and the amount charged to the account of the State Bank. The assignment to the plaintiff in the New York suit was entirely voluntary. The reasons assigned for its being made are, that the defendant was advised that its suit against the State Bank could be more expeditiously and efficaciously prosecuted in that form than in its own name, and that it would thereby be relieved from the duty incumbent on non-resident suitors of giving bond with sureties for a large sum. It is admitted that the suit in New York was, in everything but name, the suit of the defendant. The State Bank received actual notice of the New York suit. The petitioner took no step to prevent the National Park Bank from paying the defendant's judgment, nor did he invoke the assistance of the New York courts to get possession of the property of the State Bank located in that state.

Upon these facts, the receiver seeks an order requiring the defendant to pay him not only the \$470.30 standing to the credit of the State Bank on the books of the defendant, but also the money recovered and collected by virtue of the New York judgment. The latter branch of the relief claimed is put upon the ground that, by force of law, the title to all the property belonging to the defunct bank, immediately on his appointment as receiver, became vested in him as the officer of this court, and that, consequently, the defendant's conduct was not only a contempt of the authority of this court, but also a fraud upon that

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provision of the law respecting insolvent corporations, which directs that creditors without liens shall be paid equally, or proportionally to the amount of their respective debts.

With regard to the first branch of the relief sought, it is manifest that no ground for the interference of this court is shown. The case is the ordinary one where one person owes another a sum of money, and, on demand, has refused to pay. It is marked by no element of fraud, trust, accident, mistake, or other ground of equity cognizance; and, unless this court can entertain an ordinary collection suit, it has no jurisdiction in the matter. It is plain the petitioner has no right to relief here in respect to this claim.

His right to relief, in respect to his other claim, rests on this proposition: that he became invested, by operation of law, on his appointment as receiver, with the title to all the personal property of the corporation, whether located in this state or elsewhere; and this proposition is based, in turn, on the maxim that personal property has no *situs*, but follows that of its owner—*Mobilia sequuntur personam*. But this maxim does not express the prevailing doctrine with regard to property located in other jurisdictions than that within which the owner is domiciled. It has been said that the statement that personal property has no *situs*, expresses a metaphysical rather than a legal truth; for it cannot be questioned that goods found within the limits of a sovereign's jurisdiction are subject to his laws, and it would be an absurdity, in terms, to affirm to the contrary. *Smith v. Union Bank of Georgetown*, 5 Peters 518. It may be considered as part of the settled jurisprudence of this country, says Chancellor Kent, that personal property, as against creditors, has locality, and the *lex loci rei sitæ* prevails over the law of the domicile with regard to the rule of preferences in the case of insolvents' estates. The laws of other governments have no force beyond their territorial limits; and, if permitted to operate in other states, it is upon a principle of comity, and only when neither the state nor its citizens would suffer inconvenience from the application of the foreign law. 2 Kent's Com. 406. And

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in *Moore v. Bonnell*, 2 Vr. 90, 94, Chief-Justice Beasley, speaking for the supreme court, said :

“In my opinion, it has been rightly held that the law of comity does not prevent an independent government, in the exercise of its undoubted authority, from effectuating its own local policy with regard to the property of [an insolvent] debtor found within its territory.”

It is obvious that a transfer of title, by operation of law, can only be effected within the limits of the territory where the law prevails ; and, as the laws of a state have no extra-territorial force, it follows that the title to property located in one state cannot be passed by force of the laws of another. In such cases the law operates, if at all, on the property ; and if the property is without the territorial limits of the state whose legislature enacted the law, it is plain that the law can have no effect upon it, except in virtue of the comity or courtesy which prevails among different nations and states by force of international law. The boundaries of this comity, I think, are very clearly defined. No state is bound to give effect to the law of a foreign state when, to do so, will prejudice either the rights of its citizens or the interests of the state ; but, on the contrary, each state is bound to give its citizens the full benefit of all the remedies and securities provided by its laws. *Hoyt v. Thompson's Exr.*, 19 N. Y. 207 ; *Willits v. Waite*, 25 N. Y. 577 ; *Kelly v. Crapo*, 45 N. Y. 86. But where a transfer of property is valid by the *lex loci*, whether it be effected by the act of the debtor, or by operation of law, no just rule of comity requires the courts of the state where the property happens to be located, to adjudge such transfer to be invalid, at the instance of citizens of other states, simply on the ground that it is incompatible with its laws. For example : A transfer of property located here, made by a citizen of New York, which, though inconsistent in substantial respects with the provisions of our law, yet if valid by the law of New York, will be enforced here against everybody but the citizens of this state. This is now the established doctrine of the courts of this state. *Bentley v. Whittemore*, 4 C. E. Gr. 462 ; *Moore v. Bonnell*, *ubi supra*.

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Applying this rule to the case in hand, it is obvious that if the defendant had brought its action in New York, in its own name, it would not have been permitted to proceed against the property of the bank located in New York, as though the title to it stood unaffected and unchanged, but it would have been held bound by the law of its domicile. By that, the title to the property in question was vested in the petitioner for the equal benefit of all creditors occupying the same rank. In a case in all material respects precisely similar, the courts of New York have held that a creditor who, by legal proceedings instituted in another state, had put himself in possession of the property of an insolvent debtor, which had been previously assigned pursuant to the laws of that state, acquired no title thereto against the assignee, and that the assignee was entitled to recover it in an action of trover. *Van Buskirk v. Warren*, 34 Barb. 457; S. C., 13 Abb. Pr. 145.

The fact that the defendant assigned its claim to a person who, according to the rules of comity, was entitled to greater consideration and a higher position before the courts of New York than it was, adds nothing to the strength of its claim, nor should that fact induce the court to award it anything to which it was not entitled by strict law.

Up to this point it has been assumed that the appointment of the petitioner as receiver, *ipso facto*, invested him with title to the property of the bank. The statute does not expressly declare that such change of title shall be effected by his appointment, but simply says that he shall have power and authority to take possession of the property of the corporation, and to sell and convey or assign it. *Rev. 189 § 72*. In this respect it differs materially from the recent bankrupt law, under which the registers in bankruptcy were given authority to transfer the property of bankrupts to their assignees; and also from our statute regulating proceedings against insolvent debtors, which directs that the debtor shall, before his discharge, execute an assignment of his property to the assignee appointed by the court. *Rev. 499 § 11*. Both of the statutes last named plainly provide that the debtor or owner shall be divested of title, and that his assignee

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shall be invested with it. They do something more than simply put the debtor's property *in custodia legis*. Not so, however, with the statute under consideration. That merely confers a right to take possession and power to sell. It does not change the title, but leaves it in the same condition as the title to property seized under execution is left; the law takes custody of the property, leaving the title unchanged, until a sale becomes necessary. In such cases, no change of title occurs until sale is made. The officer has merely a power of sale, but until the power is exercised the title remains as it was before seizure. If the defendant in execution pays the debt, the writ becomes inoperative; the law then relaxes its grasp, and the defendant's title to the property at once becomes as perfect as it was before seizure. So, too, if the action in which a receiver is appointed is dismissed and the receiver discharged, no act of transfer is required to give or restore title to the corporation. By the dismissal of the action, the court renounces its power over the property, and the corporation resumes possession, not in virtue of a new or restored title, but in virtue of a previous unchanged title.

This was the construction given to this statute as early as 1843. Chancellor Pennington, in *Willink v. Morris Canal and Banking Company*, 3 Gr. Ch. 377, held that the appointment of a receiver did not effect a change in the title to the property of an insolvent corporation, but merely put him in the place of the directors or managers, and simply invested him with a naked power of sale. Chancellor Halsted, however, in the subsequent case of *Corrigan v. Trenton Delaware Falls Company*, 3 Hal. Ch. 489, held that the appointment of a receiver operated, by force of the statute, as a conveyance to the receiver, but this opinion was expressed without attempting to show that it was warranted by the language or purpose of the statute, and, it would seem, in ignorance of the prior adjudication. When the language of the statute under consideration is contrasted with that of the two kindred statutes before referred to, it seems to be very clear that the interpretation given to it by Chancellor Pennington is the one that must prevail.

So far, the case has been considered as though the fact was

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definitely established that the payment made by the National Park Bank to the defendant was made under compulsion of law. The petition avers that by means of the judgment recovered in New York, and proceedings subsequently had thereon, the defendant received from the National Park Bank a certain sum of money, being part of the amount due from the latter bank to the State Bank. The answer simply says that the defendant has been informed that subsequent to the recovery of the judgment, the National Park Bank paid it. No proofs were offered on this point, except to show that in the account kept by the National Park Bank the State Bank stands charged with the amount of the judgment. In this condition of the proofs there is certainly no warrant for a finding that the payment to the defendant was made pursuant to any authority whatever. It would seem to have been purely officious. If so, it is clear the debt is not discharged, and the receiver has a perfect remedy against the original debtor. A debtor cannot discharge his liability to his creditor by seeking some person whom his creditor happens to owe and paying his debt to him.

But if my judgment was for the petitioner on all other points, I think it is clear, according to the established practice of the court, that the court could give the petitioner no relief on the present record. He is here by petition, and not by bill. So far as I am aware, no instance exists in which relief of the character sought, and on a case similar to that exhibited here, has been awarded on a petition. It is undoubtedly true that there are cases in which a suitor may institute a suit or proceeding in this court by petition, but I think the use of such process, for such a purpose, must be held to be limited to those instances in which the legislature has expressly authorized its use, or where its use has the sanction of long-established practice. Suits for divorce may be commenced by petition (*Rev. 316 § 7*), and so may a suit to procure an adjudication of insolvency against a corporation (*Rev. 189 § 70*), and proceedings for the sale of lands limited over may be begun in the same manner (*Rev. 1053 § 42*). And by the long-established practice of the court, infants may have guardians assigned for them, and orders for maintenance made,

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under proceedings instituted by petition, and without bill. *Ex parte Salter*, 3 Br. C. C. 500; *Ex parte Mountfort*, 15 Ves. 445; *In re Bostwick*, 4 Johns. Ch. 100.

Except in these and a few other instances, I think the use of a petition as the initial process in an equity suit or proceeding is without precedent, and contrary to the uniform course of practice. It is ordinarily used for interlocutory purposes. Chief-Justice Shaw defined it as follows :

"A petition, in legal language, describes an application to a court, in writing, in contradistinction to a motion, which may be made *viva voce*." *Bergen v. Jones*, 4 Mete. 371.

This definition was adopted in *Shaft v. Phoenix Mut. Life Ins. Co.*, 67 N. Y. 544. Mr. Daniell, in his treatise on Practice, says :

"Interlocutory applications, when made *viva voce*, are called motions; when made in writing, they are called petitions. There does not appear to be any distinct line of demarkation between the cases in which they should be made by motion and in which they should be made by petition, but, as a general rule, where any long or intricate statement of facts is required, the application should be made by petition, while, in other cases, a motion will be sufficient." 2 Dan. Ch. Pr. 1587.

The same office is assigned to petitions by other writers in equity practice. 1 *Smith's Ch. Pr.* 70; *Adams's Eq.* 348; 1 *Barb. Ch. Pr.* 579. As a general rule, a petition cannot be presented in a cause until the bill has been filed. 2 *Dan. Ch. Pr.* 1604. Petitions for leave to sue *in forma pauperis* are an exception to this rule. 1 *Barb. Ch. Pr.* 579. By Lord Bacon's eightieth ordinance, it is ordained that no final order shall be granted on petition. 2 *Montague's Life of Bacon* 484.

The petitioner, although an officer of this court, is entitled to no privilege here that would not be accorded to any other suitor. In seeking relief here he must come by the same process that other suitors are required to use, and must prosecute his suit in the same manner that any other suitor would be required to do. The rules of practice are as much a law unto him as to other

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suitors, and while the present rules of practice remain in force, no suitor can have relief, on a case like that on which the petitioner's claim to relief rests, unless he seeks it by formal bill.

For these reasons, I think the petition must be dismissed, with costs.

BRIDGET HANNON

v.

THOMAS V. J. CHRISTOPHER.

1. A devise to three persons, "to the survivor of them, and to the heirs and assigns of such survivor," creates a joint estate for life in the three, with contingent remainder in fee to the survivor.

2. Whether a contingent or an after-acquired interest will pass by estoppel, as the result of a conveyance by deed of bargain and sale, without covenants, depends upon whether it was the intention of the parties to convey it; and whenever it clearly appears that such was their intention, it is the duty of the court to adjudge an estoppel, in order that the deed may be carried into effect according to the minds of the parties.

3. Equity recognizes no rule as binding which will constrain it to do injustice.

4. Whether the appearance of the truth on the face of the instrument will defeat an estoppel or not, must depend upon the fact whether it is so expressed that it can be readily seen and understood by the person who ought to be influenced by it, or in manner so technical or obscure that it was not seen nor understood by such person, who dealt with the party sought to be estopped, as though the words on which the estoppel is founded expressed the whole truth.

5. Where lands are conveyed by deed of bargain and sale simply, which ordinarily operates only to transfer vested interests, but it distinctly appears on the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently acquired interest. ✓

On motion to dissolve injunction, heard on bill and answer.

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Mr. S. B. Ransom, for motion.

Mr. Peter Bentley, *contra*.

VAN FLEET, V. C.

The defendant seeks to have an injunction, which has been granted against the further prosecution of an action of ejectment, dissolved. The facts on which the motion must be decided are undisputed. They show that Mary Vermilya died seized in fee of the lands in dispute, in 1824, leaving a will, in which she made the following devise :

" And also I give and devise all my real estate, whatsoever and wheresover, unto my niece, Mary Ann Jarvis, my mother, Sarah Vermilya, and my brother, Thomas Vermilya, to the survivor of them, and to the heirs and assigns of such survivor."

The lands in dispute passed by this devise. The devisees died in the following order : First, Sarah Vermilya, March 30th, 1834 ; second, Mary Ann Jarvis, January 29th, 1846, and lastly, Thomas Vermilya, in September, 1853. Mary Ann Jarvis married Thomas S. Christopher January 9th, 1840, and had by him two children, viz., the defendant (Thomas V. J. Christopher) and James J. V. Christopher. Thomas Vermilya, shortly after the death of his mother, Sarah Vermilya, and on the 10th of October, 1834, conveyed the lands in dispute to Mary Ann Jarvis, by deed containing the following recitals :

" Whereas, Mary Vermilya, late of the city of New York, deceased, was in her lifetime seized in fee simple of and in certain lots of land, hereinafter particularly described ; and whereas, the said Mary Vermilya did, in and by her will, by her duly made to pass real estate, bearing date September 2d, 1824, give and devise all her real estate, whatsoever and wheresover, unto her niece, Mary Ann Jarvis, her mother, Sarah Vermilya, and her brother, Thomas Vermilya, to the survivor of them, and to the heirs and assigns of such survivor ; and whereas, Sarah Vermilya, my mother, is now dead, and the said property is now vested in me, the said Thomas Vermilya, and Mary Ann Jarvis, in fee simple, and I, the said Thomas Vermilya, being desirous of vesting the whole in my niece, Mary Ann Jarvis, now this indenture witnesseth," &c.

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The deed then, in consideration of the sum of \$100, grants, bargains and sells unto Mary Ann Jarvis, and to her heirs and assigns, all the grantor's estate, right, title and interest whatsoever, under the will of Mary Vermilya or otherwise, of, in and to the lands therein described. The deed is without covenants, but the *habendum* declares that the grantee, and her heirs and assigns, shall have and hold the lands, to her and their use, absolutely, forever.

On the 6th of September, 1844, Mary Ann Jarvis, together with her husband, Thomas S. Christopher, by deed containing covenants of general warranty, conveyed the lands in dispute to John Arbuckle. Since then, in virtue of several mesne conveyances, they have become vested in the complainant. No dispute is raised respecting the regularity of the complainant's title; the objection to her case goes deeper; it is denied that the source from which she derived her title could grant a fee.

Thomas Vermilya, the survivor of the three devisees, died, as already stated, in September, 1853. He left a will, by which he gave his whole estate to the defendant (Thomas V. J. Christopher) and to the defendant's brother, James J. V. Christopher, and to the defendant's father, Thomas S. Christopher. The defendant's father and brother both subsequently died intestate, and without leaving any other relative as near in blood as he; consequently, the whole estate of which Thomas Vermilya was seized at the time of his death is now vested in the defendant. The defendant, under a claim that the deed from Thomas Vermilya to Mary Ann Jarvis passed only a life estate, and that the fee is now vested in him, has brought an action of ejectment against one of the complainant's tenants. That suit has been enjoined at the instance of the complainant, and the question now before the court is, whether or not, on the facts first narrated, the defendant is entitled to have that injunction dissolved. The main topic of debate presented by the case is, whether or not the deed of 1834, made by Thomas to Mary Ann, should be adjudged to have created an estoppel, which should debar Thomas, and those standing in his rights, from asserting a claim to the estate subsequently cast upon him by the death of Mary

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Ann. At the time Thomas made that deed, it is admitted he was seized of only a life estate, with a possibility that the contingent remainder in fee might vest in him as survivor. The legal construction of the devise is, in my judgment, entirely clear. The three devisees took a joint estate for life, with contingent remainder in fee to the survivor. Under our system of real property law, neither words of inheritance nor perpetuity are necessary to pass a fee by will. By the common law they were, but a devise to A and his assigns forever, or to A and his heir, would pass a fee. *4 Com. Dig. 161, tit. "Estate by Devise" n. (4)*. So a devise to one *et sanguini suo* would pass an estate of like quantity. *Gilbert on Dev. 19*. By a statute passed in 1784, it is enacted that all devises in which the words heirs and assigns, or heirs and assigns forever, are omitted, and no expressions are contained whereby it shall appear that such devise was intended to convey an estate for life only, shall be construed deemed and adjudged, in all courts of law and equity, to convey an estate in fee simple in as full a manner as if the lands had been given to the devisee, and to his heirs and assigns forever. *Rev. 300 § 13*. Hence, as the law stands, a devise to A, *simpliciter*, in which nothing appears indicating a purpose to give him only a life estate, will create a fee. In view of the provisions of this statute, it is clear that if the devise in this case had been to the three, and to the survivor, without more, the survivor would have taken the fee, and such, obviously, in view of the terms of this devise, must have been the construction it would have received according to the common law, and in the absence of a statute like that just cited. A devise to two, and the survivor of them, and the heirs of such survivor, gives them a joint estate for life only, with contingent remainder in fee to the survivor. *2 Fearne on Rem. 66 § 187 a; Vick v. Edwards, 3 F. Wms. 372*.

Thomas Vermilya, then, according to the legal construction of this devise, became seized of the fee of the lands in dispute on the death of his niece, Mary Ann Christopher. The defendant stands in his place, with no greater rights or higher equity. He is simply the donee of Thomas, and the case must

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be decided in the same manner that it would be if Thomas were the person seeking to dissolve this injunction. The recitals of the deed made by Thomas to Mary Ann show, beyond all question, that the estate about which they were dealing, and which Thomas intended to convey, and Mary Ann expected to get, was the fee. It is incontrovertible that the decisive and controlling representation of the deed is that in which it is said, that "*the said property is now vested in me, Thomas Vermilya, and my niece, Mary Ann Jarvis, in fee simple.*" They manifestly dealt on the basis that they were the owners, absolutely, of as great and as perfect an estate as it is possible to hold in lands.

Do the recitals of this deed create an estoppel against Thomas?

There is an apparent conflict in the adjudications upon the question whether a deed of bargain and sale, without warranty of title, but containing recitals showing that the parties evidently dealt under a belief that the grantor was seized of a greater estate in the lands than he actually had at the time of its execution, will bind or transfer, by estoppel, a contingent or subsequently acquired estate. Some seem to hold that a grant in this form is utterly inefficacious to pass an estate not yet vested, and can only operate as a conclusion between the parties and their privies on an estate vested at the time of its execution; while others, resting upon a much more liberal and just basis, hold that whether a contingent or an after-acquired interest will pass by estoppel, as the result of a conveyance in this form, depends entirely upon whether it was the intention of the parties to convey it, and that whenever it clearly appears that such was their intention, it is the duty of the court to adjudge an estoppel, in order that the deed may be carried into effect according to the minds of the parties. No review of the learning on this subject will be attempted. The limits of a judicial opinion are neither sufficient nor adapted to such an undertaking. The cases will be found collected in the American notes to the Duchess of Kingston's case, 2 *Smith's L. C.* 623, *et seq.*

In my opinion, the latter view is the correct one. It commends itself to my sense of justice as being in entire accord with certain fundamental doctrines of the law, and it is obviously

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better adapted to promote and further justice than its opposite. It appears to be a natural deduction from, if not an actual exemplification of, that great principle which declares that in searching for the meaning of an instrument, that interpretation shall prevail which is "as near the minds and apparent intent of the parties as it possibly may be, and the law will permit." *Shep. Touch. ch. V. p. 85*. And "if it cannot operate in one form, it shall operate in that which, by law, will effectuate the intention of the parties." *Goodtitle v. Bailey, Cowp. 597*.

The most accurate and lucid statement of the essentials of such an estoppel that has come under my observation, is that given by Mr. Justice Nelson, in pronouncing the opinion of the supreme court of the United States, in the case of *Van Rensselaer v. Kearney, 11 How. 297, 301*, in which he says :

"That if the deed bears on its face evidence that the grantor intended to convey, and the grantee expected to become invested with an estate of a particular description or quality, and that the bargain proceeded upon that footing between the parties, then, although it may not contain any covenants of title, in the technical sense of the term, still, the legal operation and effect of the instrument will be as binding upon the grantor and those claiming under him, in respect to the estate thus described, as if a formal covenant to that effect had been inserted, at least so far as to estop them from ever afterward denying that he was seized of the particular estate at the time of the conveyance."

Then, after a careful examination of several previous adjudications, both by the courts of England and of this country, he further says :

"The principle deducible from the authorities seems to be that whatever may be the form and nature of the conveyance to pass real property, if the grantor sets forth on the face of the instrument, by way of recital or averment, that he is seized or possessed of a particular estate in the premises, and which estate the deed purports to convey, * * * the grantor, and all persons in privity with him, shall be estopped from ever afterwards denying that he was so seized and possessed at the time he made the conveyance. The estoppel works upon the estate, and binds an after-acquired title as between the parties and privies. The reason is, that the estate thus affirmed to be in the party at the time of the conveyance, must necessarily have influenced the grantee in making the purchase, and hence the grantor and those in privity with him, in good faith and fair dealing, should be forever thereafter precluded from gain-saying it."

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The rule thus established was subsequently affirmed in *French v. Spencer*, 21 How. 228. Chancellor Walworth, prior to the decision of *Van Rensselaer v. Kearney*, had enunciated the same doctrine, substantially, in giving his opinion, as a judge of the court of errors of New York, in *Jackson v. Waldron*, 13 Wend. 178; and his formula of the rule was subsequently quoted and approved in *Fitzhugh v. Tyler*, 9 B. Mon. 559. The learned editor of the American notes to the Duchess of Kingston's case, states that the fair result of the more recent cases would seem to be, that whenever the terms of the deed, or of the covenants which it contains, clearly show that it was meant to convey an absolute and indefeasible title, and not merely that which the grantor had at the time, it will bind and pass every estate or interest which may vest in him subsequent to its execution, whether the warranty which it contains be general or special, and although it may contain no warranty whatever. 2 *Smith's L. C.* 636. In the language of Mr. Justice Nelson, it is clear that this doctrine is founded upon the highest principles of morality, and recommends itself to the justice and common sense of every one.

But for the presence of another fact in the recitals of this deed, viz., a correct recital of the terms of the devise, I think it might very properly be declared, at this point, without further consideration, that the defendant is estopped. The presence of this fact makes the recitals, in their legal essentials, flatly contradictory. The grantor says that he and his grantee hold the lands in fee; but in stating the facts from which this conclusion is deduced, he shows, at least to the professional mind, that his deduction is entirely unwarranted. Now, it cannot be doubted that it was originally held that there could be no estoppel by deed where the truth appeared on the face of the instrument. 4 *Com. Dig.* 205, tit. "*Estoppel*" (E 2); *Sinclair v. Jackson*, 8 Cow. 543; *Pelletreau v. Jackson*, 11 Wend. 111; *Jefferys v. Bucknell*, 2 Barn. & Ad. 278; *Wolling v. Camp*, 4 Harr. 148. But this rule, like all other legal rules, was formulated for the doing of justice, and when it cannot be used for that purpose, but its enforcement will lead to injustice or wrong, it should be disregarded. Equity

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recognizes no rule as binding which will constrain it to do injustice. Recently this rule has been repudiated by three of the superior courts of England—chancery, exchequer chamber and queen's bench. In the court of chancery, Lord Chelmsford declared that the appearance of the truth on the face of the deed constituted a reason rather why the party should be held to be estopped, than that he should be permitted to gainsay or disprove what he had previously admitted or alleged. I quote his words:

"It appears to me that the circumstance of the truth of the case appearing upon the deed, is a reason why the agreement of the parties, which it embodies, should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or, by way of estoppel, to prevent their denying the right to do the acts which they have authorized to be done." *Jolly v. Arbuthnot*, 4 De G. & J. 224.

And Chief-Baron Kelly, in giving his opinion in *Morton v. Woods*, L. R. (4 Q. B.) 293, said that if there were any decisions or *dicta* which held that where the truth appears there can be no estoppel, that doctrine must now be considered overruled; and he thought it had been rightly overruled. The same case, when before the court of queen's bench, was decided in the same way. L. R. (3 Q. B.) 658.

Now it cannot be denied that the truth appears on the face of the deed under consideration, but it is also entirely clear that the parties dealt with each other as though it did not appear there. It must also be admitted that what is false, as well as what is true, is declared on the face of this instrument, and that the parties dealt with each other, obviously, understanding that truth and falsehood, in this instance, were consistent. The truth was obscurely stated, and the falsehood plainly, and they dealt, consequently, on the basis of the falsehood. In this condition of affairs, I think it would be a manifest misapplication of legal principles to say that the truth bars the estoppel. The true rule upon this subject I take to be this: Whether the appearance of the truth on the face of the instrument will defeat an estoppel or not, must altogether depend upon the fact whether it is so expressed that it can be readily seen and understood by the person

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who ought to be influenced by it, or in manner so technical or obscure that, although it must be admitted it appears in the instrument, yet it is certain it was not seen nor understood by the person who should have been influenced by it, but that he dealt with the party sought to be estopped as though the words on which the estoppel is founded expressed the whole truth.

The great purpose, lying at the foundation of the law of estoppel, is to prevent fraud, either actual or legal. Estoppels are to be used as shields, not as swords. A simple reading of the recitals of this deed can leave no doubt on the mind of any person as to the basis on which the parties dealt. They were dealing with the fee. Thomas intended to grant to Mary Ann the fee simple absolute, and she expected to get it. That was the estate for which she paid her money, and that was the estate Thomas intended to convey to her. Now, if Thomas were here insisting that inasmuch as his deed told both the truth and a falsehood, it was equitable and just that he should be allowed to recover the lands in dispute, in spite of the fact that he had received full compensation for them many years ago, his conduct, according to my notions of legal ethics, would constitute a fraud of the most offensive character. Thomas's donee, in legal principle if not in morals, stands just exactly where Thomas would, if he, instead of the defendant, were now asking for a dissolution of this injunction. My conclusion is that it should be adjudged that the defendant is estopped by the deed of 1834.

But another ground for equitable relief remains to be considered. The complainant contends that, even if it be admitted that Thomas had no interest in the lands, at the date of his conveyance, upon which a deed of bargain and sale could operate, by way of estoppel or otherwise, still, inasmuch as it distinctly appears on the face of his deed that it was intended to convey any future interest which he might acquire, and was not intended to be limited to the interest which he then had, equity will enforce the deed as an executory agreement to convey the subsequently-acquired interest. This contention is founded on the most obvious principles of justice, and is supported by very high authority. The adjudications supporting it will be found collected in §

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Smith's L. C. 641; 2 Story's Eq. Jur. § 1040 c; and 2 Spence's Eq. Jur. 852. Chief-Justice Tilghman, in *McWilliams v. Nisly*, 2 *Serg. & R. 509, 515*, said :

"Equity will enforce a covenant to convey an estate whenever it shall be acquired by the covenantor, and the case is not the less strong where there is an absolute conveyance."

This ground of relief is, unquestionably, a matter of which a court of equity only can take cognizance. While I am decided in my opinion that the deed of Thomas to Mary Ann contains matter which creates an estoppel against Thomas and all who may claim under him as heirs or devisees, still, so far as I am aware, the question whether a deed in this form will create an estoppel or not is, as a matter of law, undecided in this state. To compel the complainant, therefore, to litigate the question of estoppel in the court where the action of ejectment is pending, is to send her to a tribunal which it is clear is incompetent to give her one measure of relief to which she seems entitled. If the injunction should be dissolved, and it should then turn out that the court in which the action of ejectment is pending should be of opinion that the deed created no estoppel, the complainant would be compelled either to yield possession of the land, or return here in order that her additional claim to relief might be determined.

For these reasons I think the defendant's motion should be denied.

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NICHOLAS J. DEMAREST and LAWRENCE J. KEEFE

v.

LAWRENCE J. HARDHAM.

1. Several persons may join in a suit to restrain a nuisance which is common to all, and affects each in the same way ; but where several persons owning distinct parcels of land, or occupying different dwellings, and having no common interest, seek to restrain a nuisance in consequence of the special injury done to each particular property, each must bring a separate suit, and obtain relief, if at all, on his own special wrong.

2. Relief by injunction to restrain a business in itself lawful, is not a matter of right, but rests in discretion. If the legal right is not clear, or the injury is doubtful, eventual or contingent, equity will give no aid.

3. If the fact of an actionable nuisance is established, the court is bound to compare consequences and if it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to interfere.

4. The law does not regard every trifling injury or annoyance as an actionable nuisance. No man is under a legal duty to consult the taste or preferences of his neighbor in the use of his property, but he is bound to respect his neighbor's legal rights.

5. In such cases, the court should consider the customs of the people, the nature and character of their employments, the uses to which they generally devote their property, and the circumstances and surroundings of the business which is alleged to be a nuisance. What would constitute a nuisance in one place would be perfectly legitimate in another.

6. Complainants and defendant occupied adjoining buildings, the walls touching in places. The force of the defendant's machinery caused the building of the complainants to vibrate to such an extent as to seriously interfere with the business of the complainants.—*Held*, that the defendant was guilty of a nuisance which it was the duty of the court to restrain.

On final hearing on bill and answer, and proofs taken in open court.

Mr. George W. Hubbell, for complainants.

Mr. John R. Emery, for defendant.

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VAN FLEET, V. C.

This suit is brought to restrain a nuisance. The complainants and defendant occupy adjacent buildings on the north side of Market street, in the city of Newark. The complainants manufacture harness in theirs, and the defendant carries on the printing and book-binding business in his. The complainants are copartners. Each building stands as close up to the line dividing the lots on which they are built as the walls could well be built, and consequently the west wall of the complainants' building, in some places, comes in contact with the east wall of the defendant's building. The defendant has possession of the second, third and fourth floors of the building he occupies, and generates and expends the steam power he uses on the third floor. He has there a twelve-horse power engine with boiler attached, and six printing presses—four operated by steam, and two by hand. This machinery is so placed that its power is exerted in lines running east and west, in other words, across the building, and not longitudinally, and consequently the west wall of the complainants' building is compelled to receive whatever shock is produced by its force.

The bill alleges that the force which the machinery expends against the complainants' building is so great that it causes an oscillation of a quarter of an inch, and that the shaking and jarring thus produced has caused the east wall to crack, and to deflect from its original position to such an extent as to weaken

NOTE.—In the following cases, vibration, either alone or in connection with noise, smoke, soot &c., was held to be a nuisance: *Wood on Nuisance* §§ 553-568; *McKeon v. See*, 28 How. Pr. 238, 4 Robt. 449, 51 N. Y. 300; *Wesson v. Washburn Manuf. Co.*, 13 Allen 95; *Dennis v. Eckhardt*, 3 Grant's Cas. 390, 54 Pa. St. 274, 2 Am. Law Reg. (N. S.) 166; *Wallace v. Auer*, 10 Phila. 356; *Dittman v. Repp*, 50 Md. 516; *Robinson v. Baugh*, 31 Mich. 290; *Farrell v. Foster*, 34 Leg. Int. 88; *Scott v. Firth*, 4 F. & F. 349; *Crump v. Lambert*, L. R. (3 Eq.) 409; *Heather v. Pardon* (1878), Eng. Ch. Div. 17 Alb. L. J. 17; *Barlow v. Kinnear*, 2 Kerr 94; *Ball v. Ray*, L. R. (8 Ch.) 467. But see *Mumford v. Oxford Railway Co.*, 36 E. L. & E. 580, 1 H. & N. 34; *Gilbert v. Showerman*, 23 Mich. 448; *Green v. Lane*, 54 Miss. 540; *Goodall v. Crofton*, 33 Ohio St. 271; *Pool v. Coleman*, 8 Daly 113.

As to the rumble and jarring of railroad cars, see *Wood on Nuisance* § 748;

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the whole building and endanger its safety and stability. It is also alleged that the motion of the machinery produces a vibration in the complainants' building so constant and serious as to materially obstruct and interfere with them in the prosecution of their business. All their workmen, it is charged, are more or less affected by it. To some it gives headache, and in others it produces sickness at the stomach, and it prevents all from doing their work in comfort and quiet.

Two distinct injuries, it will be observed, are alleged: one affecting the building alone, and the other the business carried on in the building. The complainant, Nicholas J. Demarest, is sole owner of the building. The other complainant, Lawrence J. Keefe, has no interest in it except as lessee, and the fact that he is lessee appears only by inference. He certainly can have no relief for any injury which may have been done, or which it may be apprehended will be done, to the reversion. The duration of his term yet to come, whether a month or ten years, is a thing about which the evidence furnishes no information whatever.

Several persons may join in a suit to restrain a nuisance which is common to all and affects each in the same way. For example, if a slaughter-house is erected in a populous part of a town, and the offensive and deleterious odors there generated are allowed to diffuse themselves throughout the neighborhood, all injuriously affected by them may join in the same suit; for in such case the

First Baptist Church v. Schenectady R. R., 5 Barb. 79; *First Baptist Church v. Utica R. R.*, 6 Barb. 311; *Williams v. New York Central R. R.*, 18 Barb. 222; *Randle v. Pacific R. R.*, 65 Mo. 325; *Sparhawk v. Union R. R.*, 57 Pa. St. 374; or noise and hammering in a forge, *Ray v. Lynes*, 10 Ala. 63; *Doellner v. Tynan*, 38 How. Pr. 176; *Norcross v. Thoms*, 51 Me. 503; *Whitaker v. Hudson (Ga.)*, 10 Cent. L. J. 397; *Buller v. Rogers*, 1 Stock. 487; *Fish v. Dodge*, 4 Denio 311.

An acquittal on an indictment is no bar to a subsequent injunction for the same nuisance, *Minke v. Hopeman*, 87 Ill. 450. See *Crowder v. Findler*, 19 Ves. 616; *Atty.-Gen. v. Nichol*, 3 Meriv. 686, 16 Ves. 333; *Ollendorff v. Black*, 4 De G. & Sm. 211; *Hyatt v. Myers*, 73 N. C. 232; *Taylor v. Commonwealth*, 29 Gratt. 780; *Hazeltine v. Case*, 46 Wis. 391; *Eastman v. Amoskeag Co.*, 47 N. H. 71; *Bassett v. Salisbury Co.*, Id. 426; *Penn. Lead Co.'s Appeal*, 11 Reporter 246; *Saull v. Browne*, L. R. (10 Ch.) 64.—REF.

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injury is a common one, and the object of the suit would be to give protection to each suitor in the enjoyment of a common right. But that is not the case where several persons, owning distinct parcels of land, or occupying different dwellings, and having no common interest, seek to restrain a nuisance in consequence of the special injury which it does to his particular property. In such cases each must bring a separate suit, and obtain relief, if at all, on his own special wrong. *Davidson v. Isham*, 1 Stock. 186; *Morris and Essex R. R. Co. v. Prudden*, 5 C. E. Gr. 530. Several occupiers of houses in town cannot sue as co-plaintiffs to restrain the erection of a steam engine, which would be a nuisance to each. *Hudson v. Maddison*, 12 Sim. 416. In *Davidson v. Isham*, Chancellor Williamson held that several persons cannot unite distinct individual cases, and by such combination make out a case which neither could establish separately if he were required to sue alone.

This suit having been brought by two, the complainants are bound, in order to succeed, to show a joint injury, such as will entitle them to joint relief. If either has succeeded in establishing a strong case of separate individual wrong, he can have no relief under the present bill, for, according to the settled practice of the court, two persons have no right to make a joint complaint for any injury except one common to both. This conclusion, fortunately, works no loss or delay in this particular case, for I regard it as entirely clear, on the evidence, that no such case of injury, or even danger to the safety or stability of the building, has been shown as would entitle the complainant Demarest to an injunction if this suit had been brought by him alone.

The important question presented by the case is, does the manner in which the defendant conducts his business interfere with or injure the business of the complainants to such an extent as to create a nuisance which it is the duty of a court of equity to enjoin? The defendant's business is not only lawful, but necessary. It is carried on in a part of the city of Newark devoted almost exclusively to manufacturing and business purposes. No objection can therefore be made to it on the ground that its

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location is not a fit one. It is not necessarily or inherently noxious, offensive or injurious. It should not, therefore, be enjoined except under a stern necessity. (The complainants ask that it be absolutely interdicted, their prayer being that the defendant be restrained from further operating his engine and presses. To grant their prayer is to destroy the defendant's business.) (Power attended with such disastrous consequences should always be exercised sparingly, and with the utmost caution. All doubts should be resolved against its exercise.) *Attorney-General v. Nichol*, 16 Ves. 338. Relief by injunction, in such cases, is not a matter of right, but rests in discretion. If the legal right is not clear, or the injury is doubtful, eventual or contingent, equity will give no aid.) *Richards's App.*, 57 Pa. St. 105; *Rhodes v. Dunbar*, Id. 274; *Huckenstine's App.*, 70 Pa. St. 102.

And so, too, the court is bound to compare consequences. If the fact of an actionable nuisance is clearly established, then the court is bound to consider whether a greater injury will not be done by granting an injunction, and thus destroying a citizen's property and taking away from him his means of livelihood, than will result from a refusal, and leaving the injured party to his ordinary legal remedy; and if, on thus contrasting consequences, it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to interfere. *Hilton v. Earl of Granville*, 1 Cr. & Ph. 283. The duty of granting or refusing an injunction is a matter resting in sound discretion. It should never be granted when it will operate oppressively, or contrary to the real justice of the case, or where it is not the fit and appropriate method of redress under all the circumstances of the case, or when it will or may work fatal injury to the person enjoined. *Jones v. City of Newark*, 3 Stock. 452. Mr. Justice Depue, speaking for a majority of the judges of the court of errors and appeals, in *Morris and Essex R. R. Co. v. Prudden*, *supra*, said:

"It must be a strong and mischievous case of pressing necessity, or the right must have been previously established at law, to entitle a party to an injunction; * * * and the writ ought not to be granted where the benefit secured by it to one party is of but little importance, while it will

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operate oppressively, and to the great annoyance and injury of the other, unless the wrong complained of is so wanton and unprovoked in its character as properly to deprive the wrong-doer of the benefit of any consideration as to its injurious character."

No rule can be framed which will accurately define what acts or facts will constitute a nuisance in every possible contingency. Each case must be decided on its own peculiar facts. There can be no doubt that a lawful business, which is not inherently a nuisance on account of its offensive character, may be so conducted as to render it a nuisance which equity will restrain. The maxim *sic utere tuo ut alienum non laedas*, undoubtedly expresses the general fundamental rule, but it is also true that the law does not regard every trifling injury or annoyance as an actionable nuisance. Things merely disagreeable, which simply displease the eye, or offend the taste, or shock an over-sensitive or fastidious nature, no matter how irritating or unpleasant, are not nuisances. No man is under a legal duty to consult the taste or preferences of his neighbor in the use of his property, but he is bound to respect his neighbor's legal rights. He cannot fill his neighbor's house with smoke, nor the air, which his neighbor has a right to breath pure and unpolluted, with nauseous or deleterious odors, nor can he throw soot or cinders into his neighbor's house or door-yard to such an extent as to deprive him of the free and full enjoyment of his property. *Ross v. Butler*, 4 C. E. Gr. 294; *Cleveland v. Citizens Gas Light Co.*, 5 C. E. Gr. 201; *Duncan v. Hayes*, 7 C. E. Gr. 25. Nor will equity permit him, in the prosecution of his business, to use machinery of such weight and power as causes a vibration in the premises of his neighbor of such extent and force as to seriously annoy and disturb his neighbor and materially interfere with him in carrying on his business. *Sturges v. Bridgman*, L. R. (11 Ch. Div.) 852.

Perhaps the most accurate statement of the rules to be observed in deciding the question whether a business is so conducted as to render it a nuisance or not, is that given by Mr. Justice Mellor in charging a jury at the Liverpool assizes in 1863. He said:

"Every man is bound to use his own property in such a manner as not to

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injure the property of his neighbor. * * * * But the law does not regard trifling inconveniences; everything must be looked at from a reasonable point of view; and therefore, in an action for nuisance to property, * * * the injury, to be actionable, must be such as visibly to diminish the value of the property, and the comfort and enjoyment of it. In determining whether a nuisance exists or not, the time, locality and all the circumstances should be taken into consideration. In counties where great works have been erected and carried on, which are the means of developing the national wealth, persons must not stand on extreme rights, and bring actions in respect of every matter of annoyance, for if they do, business cannot be carried on in those places."

This direction was approved, first, by the court of queen's bench (*Tipping v. St. Helen's Smelting Co.*, 4 B. & S. 608), and, after wards, by the exchequer chamber (4 B. & S. 616), and, finally, by the house of lords. *St. Helen's Smelting Co. v. Tipping*, 11 H. L. Cas. 642. This must be regarded as a final settlement of the law in England.

The court should always, in cases of this kind, consider the customs of the people, the nature and character of their employments, the uses to which they generally devote their property, and the circumstances and surroundings of the business which is alleged to be a nuisance. What would constitute a nuisance in one place would be perfectly legitimate, in another. The rights and comfort of the complainant must not be looked at alone. The rights and interests of his neighbors must also be regarded.

"Whether a thing is a nuisance or not," says Lord Justice Thesiger, in *Sturges v. Bridgman*, *supra*, "is a question to be determined not merely by an abstract consideration of the thing itself, but in reference to its circumstances. What would be a nuisance in Belgrave Square would not necessarily be so in Bermondsey; and where a locality is devoted to a particular trade or manufacture, carried on by the traders or manufacturers, in a particular and established manner, not constituting a public nuisance, judges and juries would be justified in finding, and may be trusted to find, that the trade or manufacture so carried on in that locality is not a private or actionable wrong."

[The principle to be deduced from the authorities I understand to be this: that an injunction to restrain a lawful business, on the ground that it is so conducted as to render it a nuisance, should never be granted, except the complainant shows an inva-

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sion of a clear legal right, resulting in permanent and serious injury, which cannot be adequately redressed by action at law, and that the allowance of the writ will not inflict upon the defendant a more serious injury than the complainant will sustain if the writ is denied and he be left to his ordinary legal remedy.] Equity takes cognizance of a nuisance which is permanent in its character, or which produces a constantly recurring grievance, more readily than any other.

The only duty remaining is to apply the law to the facts of this case. There can be no doubt that the complainants have an unquestioned right to pursue their business without obstruction or interference by the defendant. Among the fundamental rights of the citizens of this state are those of acquiring, possessing and protecting property. If the defendant conducts his business in such manner that he constantly and seriously annoys and disturbs the complainants, when engaged in the regular prosecution of their business, on their own premises, and thus, in a material degree, injures their business by depriving them and their workmen of the comfort and quiet they would otherwise enjoy, it is plain, I think, that the wrong the complainants sustain at the defendant's hands is the proper subject of equity cognizance and redress.

The proofs show that the vibration produced in the complainants' building by the defendant's machinery is so great, at times, as actually to render it impossible to do certain kinds of work there. One witness says, when the vibration is greatest, the floor seems to creep under his feet, and he cannot write at all; and the book-keeper says it prevents him, at times, from making marks with his pen that he ought to make. Several of the complainants' employees were examined as witnesses. They all swore they were more or less disturbed by the vibration. To some it gives a headache, or produces a dizzy sensation; in others, it produces nausea, closely resembling sea-sickness, and several say that when the motion is strongest they find it impossible to do such parts of their work as require a steady hand and a keen eye, as delicate stitching and exact cutting in curved or irregular lines. One swears that on several occasions he has been

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compelled, in consequence of the vibration, to take his work to his dwelling and do it there. The vibration causes everything pendent about the building to oscillate like the pendulum of a clock. The actual deflection of the walls is not shown to be over one-eighth to three-sixteenths of an inch. I confess I find it difficult to believe that so much disturbance can be produced by so slight a deflection. But I am not at liberty to decide the case on a theory or deduction based on a single fact, but must find the fact according to the truth as established by the evidence as a whole. Unless the complainants' witnesses, without exception, have exaggerated the effect of the vibration to such an extent as to render their stories downright falsehoods, it must be taken as an established fact in the case that the vibration very sensibly and materially interferes with the complainants in the prosecution of their business.

My judgment is that the defendant is guilty of a nuisance which it is the duty of this court to redress. But this conclusion does not necessarily involve the destruction of the defendant's business. The injury to the complainants, in my judgment, is caused solely by the position of the machinery. As already stated, it is now placed so that its whole force is expended across the defendant's building and directly against that occupied by the complainants. To me it seems very plain that if it is changed, so that its force shall be expended longitudinally with the building, and not transversely, the injury the complainants now suffer will be remedied, and all cause of complaint removed. That is the unanimous opinion of all the experts who have spoken upon the subject.

A decree will be advised directing the defendant to change the position of his machinery in accordance with the view above indicated, or that an injunction shall issue restraining him from operating any machinery in the building occupied by him to such an extent as shall produce a vibration in the complainants' building sufficient to annoy or disturb them in the conduct of their business. The complainants are entitled to costs.

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EDWIN R. LIVERMORE and RAYMOND B. LIVERMORE

v.

THOMAS MCNAIR et al.

1. A debtor possesses the right, even when in insolvent circumstances, of giving one or more of his creditors preference over the others; but it must always be exercised for honest ends and according to legal methods.

2. The law will not permit a thing to be done by indirect means which it is not lawful to do by direct means.

3. Equity cares very little about mere matters of form: it endeavors to deal with the substance of affairs, and to regulate its judgment according to the real purposes which have controlled parties in the matters brought before it for relief or correction.

4. A creditor has a right to have his debtor's property applied to the discharge of his debts by due course of law, and any disposition which the debtor may attempt to make that has the effect to defeat this right, is a fraud against the creditor.

5. A executed a mortgage to three of his creditors, to secure notes made to them and some other of his creditors, payable in installments, in one, two, three, four and five years. A also confessed judgment to one of his creditors, under which his personal property was sold, and bought by one of his said three creditors, and transferred by him to the wife of A, upon her executing a chattel mortgage for the full amount of the purchase-money. The object of the mortgage and judgment, as stated by A, was to prevent the sale of his property, so that he might, from its advance in value and the profits of his business, be able to pay all his creditors in full.—*Held*, that the mortgage and judgment were in contravention of both the statute regulating assignments and the statute of frauds.

On final hearing on bill and answer, and proofs taken in open court.

Mr. Joseph Coult, for complainants.

Mr. John W. Taylor, for defendants.

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VAN FLEET, V. C.

This is a creditor's suit. The complainants seek to impeach a transaction which they allege is, in all its material features, identical with that pronounced invalid by the supreme court in *Owen v. Arvis*, 2 *Dutch*. 22. It is needless to remark that, if they show this to be the fact, they will establish a good right to relief.

The following narrative presents all the material facts of the case: Thomas McNair, a baker of the city of Newark, became financially embarrassed in the winter of 1879. A meeting of his creditors was held, February 25th, 1879, when it was found that his debts amounted to about \$20,000, and that his assets were not sufficient to enable him to pay more than twenty-five cents on the dollar. The complainants offered to take his assets and pay his other creditors twenty or twenty-five cents on the dollar, but their offer was declined. Their claim represented nearly one-half of McNair's whole indebtedness, its amount being a little over \$8,500. The creditors separated without consenting to a compromise or agreeing on any plan of action. Mr. McNair's assets, at this time, were worth between \$5,000 and \$7,000. On the 25th of March, 1879, Mr. McNair, together with his wife, executed a mortgage on all his real estate to three of his creditors, securing promissory notes made to all his creditors except the complainants and one other, whose claim amounted to a little over \$4,600. These notes provided for the payment of the debts they evidenced as follows: One-tenth at the end of one year, and the like proportion respectively at the end of the second, third and fourth years, and the balance at the end of the fifth year. The aggregate debt thus secured is a trifle over \$5,900.

On the 29th day of March, 1879, Mr. McNair confessed a judgment to Martin Burne & Co. The debt on which this judgment was founded is one of those secured by the mortgage just mentioned, the payment of which had been extended from one to five years. Mr. McNair's personal property was sold under this judgment, on the 29th day of April, 1879, and purchased by Martin Burne for \$812. Mr. Burne is one of the three persons

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to whom the mortgage on the real estate was given. The next day after the sheriff's sale (April 30th), Mr. Burne transferred the personal property to the wife of Mr. McNair, for the same price he had bid it off at, and took a chattel mortgage from her on the same goods for the whole amount of the purchase-money, payable in one year. Mrs. McNair had no separate estate, and possessed neither credit nor the least business knowledge or experience. The judgment and sale under it were not used for the purpose of collecting or satisfying the debt of Martin Burne & Co., but merely to place Mr. McNair's personal property in such a position that the creditors whose debts were secured by the mortgage on the real estate, might have the benefit of it as an additional security. Martin Burne admits, in his testimony, that it was understood that the proceeds of the sale of the personal property were not to be credited on his judgment, but were to be distributed among the creditors whose claims were secured by the mortgage on the real estate.

The transfer of the personal property to Mrs. McNair was made pursuant to an arrangement made by Mr. McNair with his creditors, and not in execution of a contract of purchase. This is shown both by the evidence of Mrs. McNair and Mr. Burne. Mrs. McNair says she never had any negotiation with Mr. Burne respecting the price to be paid for the personal property, nor any talk upon that subject; and Mr. Burne says it was understood among the creditors, before the real estate mortgage was executed, that some arrangement should be made by which Mr. McNair should be permitted to carry on his business after the mortgage was given. Mr. McNair says his object in giving the mortgage was to prevent the sale of his property, and to retain it in his own hands, so that he might, from its advance in value and the profits of his business, be able to pay all his creditors in full. He further says that he repeatedly avowed this purpose to his creditors and others. He is uncontradicted on this point. After this arrangement was perfected, the bakery business was carried on in the name of Mrs. McNair, but Mr. McNair managed and controlled it almost as absolutely as he

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had before. The transfers by mortgage and sheriff's sale embraced, substantially, Mr. McNair's whole estate.

Stripped of all gloss, and stated according to the obvious purpose of the parties, the transaction brought under review is, in reality, this: A transfer by a debtor of all his estate to three trustees, upon terms which permit him to hold all his property for a period of five years, and to manage and control it as he sees fit, on condition that he shall pay certain of his creditors whom he desires to prefer, one-tenth of their respective claims at the end of each year, for four years, and the balance at the end of the fifth. In my judgment, this transaction can only be successfully defended on the ground that it is a legitimate exercise of the right which every debtor possesses, even when in insolvent circumstances, of giving one or more of his creditors preference over the others. That a debtor possesses this right, cannot be questioned; it flows necessarily from the complete dominion which the law gives every man over his own property. But it is subject to important limitations; it must always be exercised for honest ends and according to legal methods. Both the end and method are challenged in this case.

It is contended that the transaction, when viewed in its substance and practical effect, is an assignment of all the debtor's estate in trust, for the benefit of certain preferred creditors, to the exclusion of all others. If this contention is correct, there can be no doubt that the transaction must be adjudged invalid as to the complainants, for the statute regulating such assignments expressly declares that every conveyance or assignment made by a debtor of his estate, real or personal, or both, in trust to an assignee, for the creditors of such debtor, shall be made for their equal benefit, in proportion to their several demands,
 * * * * * and all preferences of one creditor over another * * * * * shall be deemed fraudulent and void.
Rev. 36.

The affair that this statute was intended to regulate is marked by two distinctive features: the transfer must embrace substantially the debtor's whole estate, and a trust for his creditors must be created. *Tillou v. Britton*, 4 Hal. 120; *Fairchild v. Hunt*,

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1 *McCart*. 367. Both these features appear in the transaction under consideration. They appear much more distinctly here than they did in the transaction brought under review in *Owen v. Arvis*. There, no trust in favor of creditors appeared at all on the face of the papers, but it was insisted, in defending the transaction, that, though no trust appeared, the real object of the conveyance by the father to his son, was to raise the means with which the father might pay his creditors. Chief-Justice Green, in speaking of this feature of the case, says, though the papers were not in form a conveyance by a debtor to an assignee in trust for his creditors, and therefore not within the terms of the act, yet they were so in substance, and therefore they contravened the policy of the statute regulating assignments, and were within the spirit of its prohibition against preferences. The fact that the assignment was effected by means of a mortgage and a judgment, will not legalize it, if it was made for a purpose which contravenes the statute. The law will not permit a thing to be done by indirect means which it is not lawful to do by direct means. Chancellor Green stated, in *Fairchild v. Hunt*, 1 *McCart*. 373, that, in his opinion, it would be very difficult to maintain the validity of a mortgage which was executed to subserve the purposes of an assignment, in which preferences, contrary to the policy of the statute, were attempted to be created.

Equity cares very little about mere matters of form; it endeavors to deal with the substance of affairs, and to regulate its judgment according to the real purposes which have controlled parties in the various matters brought before it for relief or correction. Now, I think it cannot be doubted for one moment that, if these parties had adopted the simplest course of procedure for the accomplishment of their purpose in this matter, its illegality would at once have been made so conspicuous, that no attempt would have been made to carry it into effect. To have done so, they would have had the debtor assign all his estate to three persons upon the following trusts: that he should be permitted to retain possession and control of the property, and have all the benefit arising therefrom, for the period of five

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years; provided, at the end of each of the first four years, he should pay the one-tenth of his indebtedness to certain of his creditors, whom he desired to prefer, to the exclusion of all others, and the balance at the end of the fifth year; and that, in case he failed to make any of the stipulated payments, the trustees should be authorized to convert the subject of the trust into money, and distribute the same ratably among his preferred creditors. Had this course been adopted, the written memorial of their purposes would then have expressed, in plain language, just what the evidence clearly shows the parties meant.

The sale of the personal property under the judgment, and its subsequent transfer to Mrs. McNair, and the execution by her of a mortgage for the price of the property, payable at the end of a year, would seem, in their outward appearance, to give evidence of a different purpose, but such appearance is manifestly delusive. The judgment was founded on a debt not then due; no part of it could become due for nearly a year, and the payment of six-tenths of it had just been extended five years. The sale under the judgment was not real, but deceptive. It was not made for the purpose of satisfying the judgment, but for the purpose of placing the debtor's property beyond the reach of certain of his creditors, so that he and his preferred creditors might enjoy it without molestation.

The plain design of the arrangement was to place the debtor's property beyond the reach of legal process, so that he might still practically own and control it for the benefit of himself and certain of his creditors, and bid defiance to his other creditors. Such a design is vicious in the eye of the law. It contravenes not only the policy of the statute regulating assignments, but the plain direction of the statute of frauds. Any arrangement a debtor may make, which has the effect to hinder, delay or defeat the disposition of his property by due course of law, is a fraud on his creditors. That he made it to prevent his property from being sacrificed, and thus intended to give protection to both his creditors and himself, affords no excuse or defence whatever. A creditor has a right to have his debtor's property applied to the discharge of his debts by due course of law, and any disposi-

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tion which the debtor may attempt to make that has the effect to defeat this right, is a fraud against the creditor. *Knight v. Packer*, 1 *Beas.* 214; *Johnson v. Whitwell*, 7 *Pick.* 71.

An attempt is made to distinguish this case from *Owen v. Arvis*. It is argued that the preference attempted to be created in that case was adjudged to be fraudulent, because creditors in no way sanctioned or approved the disposition the debtor made of his property. It is said he first made a fraudulent disposition of his property, and then attempted to purge his fraud by making an honest disposition of its proceeds. But here it is insisted the act of the debtor is legalized, because it was done with the sanction of the creditors who were to be benefited by it. This view, it will be perceived, entirely overlooks the fact that the act challenged is one that stands opposed to the fundamental policy of one statute and the plain direction of another. Under such circumstances, it would seem to require no argument to show that the consent of those creditors who were benefited by the act should have no effect in legalizing it against those who were defrauded by it. Without the aid of a part of his creditors, it is clear that the debtor could not, in the instance under consideration, have carried his illegal scheme into effect. They are, therefore, more blameworthy than were those who, after their debtor had made a fraudulent disposition of his property, were induced to accept part of its proceeds, under the belief that they could get nothing else; and yet, in such a case, it has been held that a creditor must be presumed to know the law, and is, therefore, chargeable with knowledge of the fact that the disposition made by his debtor of his property was in fraud of the law, and he, by accepting part of the proceeds of the fraud, becomes tainted with his debtor's fraud. *Nation v. Bank of the Metropolis v. Sprague*, 6 *C. E. Gr.* 530.

The transaction assailed in this case is, in my judgment, in contravention of both the statute regulating assignments and the statute of frauds, and must, therefore, be adjudged void as to the complainants. The complainants are entitled to costs.

Currie v. Knight.

GEORGE F. CURRIE et al.

v.

WILLIAM C. KNIGHT et al.

The direction of the statute, that the assets of an insolvent estate shall be distributed ratably among the creditors of the decedent, gives them a lien on such assets, and entitles them to a standing to contest the validity of a chattel mortgage not filed according to the statute.

On order to show cause why an injunction should not issue, heard on bill and affidavits, and answer and affidavits.

Mr. Harry L. Slape, for complainants.

Mr. MacGregor J. Mitcherson, of Philadelphia, and *Mr. J. E. P. Abbott*, for defendants.

VAN FLEET, V. C.

This is an application for an injunction. It rests on the following facts: Mary A. Ruck executed a mortgage to William C. Knight, September 25th, 1877, on certain chattels in this state, to secure the payment of \$1,500 within one year. The mortgagor died testate October 25th, 1877. The mortgage was not filed according to the statute until September 18th, 1878. The mortgagor's estate is insolvent, though no decree so declaring has been taken by her executor. The complainants are creditors at large of the mortgagor. They dispute the validity of the mortgage as to them, and ask that the mortgagee be restrained from making sale under his mortgage.

The statute directs that every chattel mortgage which shall not be accompanied by an immediate delivery, and followed by an actual and combined change of possession of the things mort-

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gaged, shall, unless filed as directed by the statute, be absolutely void as to the creditors of the mortgagor. *Rev. 709 § 39.* The creditors here meant are those having a lien on the things mortgaged. *Jones on Chat. Mort. § 245.* Creditors without a lien have no right to, or interest in the things mortgaged, and for that reason cannot be heard to question a mortgage which is valid against the person who made it. The fact that a mortgagee takes possession of the things mortgaged subsequent to the execution of the mortgage, but before a creditor at large has perfected his lien by payment or otherwise, will not give validity to the mortgage as against such creditor, if the mortgage was not filed according to the statute. *Williamson v. N. J. Southern R. R. Co., 1 Stew. Eq. 277; S. C. on appeal, 2 Stew. Eq. 311.*

An attempt has been made to aver a delivery in this case contemporaneous with the execution of the mortgage, but it is quite manifest that the possession which the pleader has struggled to assert is only such as he supposed arose out of the execution of the mortgage, and not an actual change of possession from the mortgagor to the mortgagee. His averments amount simply to the statement of a conclusion of law, without the disclosure of a single fact showing that it is warranted. But, more, a subsequent averment of the answer shows that such conclusion has no warrant in fact. The averment here particularized is that in which the defendants say that the executor of the mortgagor, on or about May 17th, 1879, allowed the mortgagee to take possession of the mortgaged chattels, and that he has since held possession of them. The change of possession here spoken of is quite inconsistent with an antecedent possession by the mortgagee.

The question of the case is, have the complainants a lien on the mortgaged chattels? The chattels constitute part of the assets of an insolvent estate. With regard to such estates, the statute declares that the estate, real and personal, of a testator or intestate, in case the same shall be insufficient to pay all his debts, shall, after certain preferred debts have been paid, be distributed among his creditors, in proportion to the sums that shall be due to them respectively. *Rev. 770 § 81.* In order

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to work out the equality of distribution here directed, a subsequent provision directs that, in case a judgment shall be recovered against an administrator or executor, after the estate which he represents has been decreed to be insolvent, no execution shall be issued thereon, and the judgment shall have no effect except to fix the amount of the debt. *Rev. 772 § 88*. In *Haston v. Castner*, 4 *Stew. Eq.* 697, the court of errors and appeals held that the statutory direction that the lands of a decedent shall be liable for the payment of his debts, creates a lien in favor of creditors at large, which gives them a right to impeach a conveyance made by the decedent in fraud of creditors. The fundamental purpose of the two statutes is the same, namely, to appropriate exclusively and irrevocably the property of a decedent to the payment of his debts. The one says that his property shall be liable for the payment of his debts, while the other declares that his property shall be distributed among his creditors. If a statutory declaration that property shall be liable for the payment of debts creates a lien, the same result must follow where the direction is, that property shall, in a certain condition of affairs, be distributed exclusively to creditors. That a creditor at large has a lien on the assets of an insolvent estate is a proposition substantially affirmed by the supreme court in *Milnor v. Milnor*, 4 *Hal.* 93. In that case, a creditor at large was permitted to attack a judgment regularly entered after the death of the defendant, though the judgment on its face purported to have been entered at the term immediately antecedent thereto. It is true his right, in that case, is not called a lien, but an interest, but except his right was that of a lien-holder, the court, according to well-established principle, had no right or power to listen to his impeachment of the judgment. The court, however, set the judgment aside at his instance.

A court of equity should not be more technical nor less liberal in extending aid to creditors, in such a case, than a common law court.

In my judgment, the mortgage in question is void as to the creditors of the mortgagor, and the mortgagee should be en-

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joined from making sale of the mortgaged chattels, or intermeddling with them in any way.

The complainants ask for the appointment of a receiver as well as an injunction. I do not see my way clear to advise the granting of this last request. The executor, it is true, now stands as the champion of the mortgagee and in an attitude of hostility towards the creditors at large, but I think he has probably assumed this position under a mistaken notion respecting the rights of the contestants, and with no design to prejudice the creditors. He will now understand that the creditors occupy the position of superior right, and will, I have no doubt, take such steps as shall be necessary to give them the full benefit of their rights. If, however, he should not, the complainants may at any time renew their application.

WILLIAM SHUTTLEWORTH

t

JAMES DUNLOP.

If a defendant, after he has notice that the complainant is non-resident, takes any step in the cause, as, for example, if he asks for the continuance of an interlocutory motion, and afterwards proceeds to hearing on it, without objection, and procures its denial, he waives his right to security for costs.

On motion to dismiss bill*Mr. P. S. Scovel*, for motion.*Mr. C. A. Bergen*, *contra*.

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The defendant asks the dismissal of the complainant's bill, because he has failed to obey an order requiring him to give security for costs. The complainant answers that the defendant has waived his right to security, and as it now appears that the order for security was obtained after such waiver had occurred, he should not be compelled to obey it in order to save his suit. The bill is filed to set aside a will for incapacity and fraud in its pro-

NOTE.—Statutes authorizing courts to require security for costs from non-resident plaintiffs, are only cumulative, *Den v. Wilson*, 2 South. 680; *Newman v. Landrine*, 1 McCart. 291; *Kyle v. Stinson*, 13 Sm. & Marsh. 301; *Dyer v. Dunivan*, 3 How. Pr. 135; *People v. Oneida Common Pleas*, 18 Wend. 652; *Horn v. Thompson*, Sau. & Sc. 622. See *Moyers v. Moyers*, 11 Heisk. 495; *Kase v. Greenough*, 88 Pa. St. 403; *Pruitt v. Fenner*, 8 R. 1. 40.

Courts will not, of their own motion, order security from non-residents. *Hauser v. Smith*, 13 Ind. 532; *Jones v. Cox*, 1 Jones 373. See *Hickman v. Haines*, 10 Ill. 20. Nor are they, in every case, bound to order such security, *Robinson v. Sinclair*, 1 Denio 628; *Whitsett v. Blumenthal*, 63 Mo. 479; *Florance v. Bulkley*, 1 Duer 705; *Fearn v. Gelpcke*, 13 Abb. Pr. 473; *Woodward v. Stearns*, 11 Abb. Pr. (N. S.) 445; *Heeron v. Beckwith*, 1 Wix. 17; *Spalding v. Bainbridge*, 12 R. I. 244; *Fisher v. Bunbury*, Sau. & Sc. 625.

The motion must be made at the first opportunity, *Carpenter v. Aldrich*, 3 Metc. 58; *Whiting v. Hollister*, 2 Mass. 102; *Lovell v. Wardroper*, 4 Prac. (Can.) 265; *Samuelson v. Andrews*, L. R. (3 Irish C. L.) 575; *Kolbe v. People*, 85 Ill. 336; and has been held too late—

After a demand of particulars, *Johnson v. Glasier* (MS.), *Stevens's N. B. Dig.* 373.

After a plea in abatement, *Randolph v. Emerick*, 13 Ill. 344.

After a demurrer, *People v. Cloud*, 50 Ill. 439.

After an appearance and plea, *Lincoln v. Hancock*, 5 Ark. 703; *Kasten v. Plaw*, 1 Moo. & P. 30; *Clark v. Gibson*, 2 Ark. 109; *Fonville v. Richey*, 2 Rich. 10; *Duncan v. Stint*, 5 B. & Ald. 703; *Jacobson v. Carr*, Cr. & Dix 107; *Watson v. Chadwick*, 8 Irish C. L. 291; *Clapp v. Beach*, 3 Me. 216. See *Fletcher v. Lew*, 3 Ad. & El. 551; *Kimbark v. Blundin*, 6 Bradw. 539; *Wood v. Bellisle*, 1 Cham. (Can.) 130; *Anderson v. Walsh*, L. R. (2 Irish C. L.) 303.

Although the plea was filed under protest, *Henry v. Hackett*, Bl. D. & O. 248. See *Bush v. Curran*, 9 Irish C. L. App. xxx.

After obtaining time to plead, *Eyre v. Dwyer*, Sau. & Sc. 653. See, further, *Gurner v. Key*, 3 Dougl. P. C. 559; *Wilson v. Minchin*, 2 Cr. & Jer. 871; *Dowling v. Harman*, 6 M. & W. 131; *Swanzy v. Swanzy*, 4 K. & J. 237.

After an answer, *Trustees v. Walters*, 12 Ill. 154; *Mayer v. Tyson*, 1 Bland 559; *Dunning v. Dunning*, 37 Ill. 306; *Hay v. Power*, 2 Edw. 494; *Schaefer v.*

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curement. The property in controversy consists almost entirely of houses and lots occupied by tenants. Shortly after the bill was filed, the complainant applied, by petition, for the appointment of a receiver. The petition, as well as the bill, disclosed the fact that the complainant resided in England. A copy of the petition was served on the defendant. The order to show cause why a receiver should not be appointed was returnable July 5th. On that day the defendant asked for a continuance

Waldo, 7 Ohio St. 309. See *Wyllie v. Elliot*, 11 Beav. 99; *Siedler's Case*, 12 Sim. 106; *Craig v. Bolton*, 2 Bro. C. C. 609; *Meliorucchy v. Meliorucchy*, 2 Va. Sen. 24.

After the expiration of the time for answering, *Freel v. Trant*, 11 Irish Eq. 278; *Leckham v. Gresham*, 2 Irish C. L. 139. See *Alker v. Alker*, 3 Irish Jer. (N. S.) 50; *Beausang v. Condon*, 13 Irish C. L. App. xxxvii; *Smith v. Dey*, 2 Ch. Cham. 456; *Ganson v. Finch*, 3 Id. 296.

After exceptions to an answer, *Burgess v. Gregory*, 1 Edw. 449.

After a replication, *Long v. Tottenham*, 1 Irish Ch. 127.

After the close of the pleadings and publication of the evidence, *Foster v. Swasey*, 2 Woodb. & M. 217.

After notice to defendant to take a decree *pro confesso*, *Nolan v. French*, 10 Irish Eq. 211. See *Tucker v. Horseman*, *Smythe* 90.

After a judgment by default, *Day v. Wilcor*, 2 McCord 454.

After a writ of inquiry on an interlocutory judgment for plaintiff, *Butler v. Wood*, 10 How. Pr. 313.

After a decree to account, *Murphy v. Archdale*, *Sau. & Sc.* 630; *Paul v. Hill*, 3 Tenn. Ch. 342.

After an order for an injunction has been made absolute, *Foster v. Eyres*, 7 Irish Eq. 638.

After issue joined and notice of trial given, *Swan v. Mathews*, 3 Duer 613; *Florence v. Bulkley*, 1 Duer 705; *Boyce v. Bates*, 8 How. Pr. 495; *Montellano v. Garcias*, 1 Bing. 67; *Michel v. Pareski*, 2 H. Bl. 593; *Muller v. Gernon*, 3 Taunt. 273; *O'Grady v. O'Connell*, 2 Irish Jur. 94; *Vance v. Campbell*, 1 Kerr 163; *Du Belloix v. Waterpark*, 1 Dowl. & Ry. 348; *Fogg v. Pypher*, 34 Prac. (Can.) 309. See *Shaw v. Wallis*, 1 Yeates 176, 2 Dall. 179; *Long v. Long*, 1 Irish Ch. 618; *Bentley v. Robinson*, 4 Irish Ch. 37; *West v. Cooke*, 1 C. B. 312.

After a continuance, *Harper v. Columbus Co.*, 35 Ala. 127; *McVicker v. Ludlow*, 2 Ohio 398; *Lavage v. Burke*, 50 Ala. 61.

After the case has been called for trial, *St. Louis R. R. v. South*, 43 176; *Beymer v. Endley*, *Tappan* 166.

After the jury has been sworn, *Wallace v. Collins*, 5 Ark. 41; *Frasure v. Zimmerly*, 25 Ill. 202; *Wheelin v. Kertley*, *Hardin* 540; *Thomas v. Tanner*, 6 Mon. 54; *Adae v. Zangs*, 41 Iowa 536.

After the plaintiff has closed his testimony at the trial, *Spencer v. Trafford*, 42 Md. 1.

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for two weeks, in order that he might submit affidavits in answer to those annexed to the petition. A continuance was granted. On July 12th, the defendant obtained an order requiring the complainant to give security for costs, and served it soon afterwards. On July 19th, the application for a receiver was heard, without objection by the defendant, on affidavits submitted by both parties, and resulted in a denial, with costs to the defendant.

After the commencement of the argument, *Edwards v. Helm*, 5 Ill. 143.

After a trial, *Jeffersonville R. R. v. Hendricks*, 39 Ind. 48, 41 Ind. 48; *Lindley v. Kindall*, 4 Blackf. 189; *Weeks v. Napier*, 33 Ala. 568. See *Boucher v. Pia*, 14 Abb. Pr. 1.

After a verdict and judgment, *Davies v. Graham*, 2 A. K. Marsh. 540; *Grimball v. Mississippi R. R.*, 3 Sm. & Marsh. 38; *Bohrs v. Sessions*, 2 Dowl. P. C. 710; *Paul v. Hill*, 3 Tenn. Ch. 342; *Furman v. Harman*, 2 McCord 436; *Flint v. Van Deusen*, 24 Hun 440.

After a motion for a rehearing, *Cator v. Collins*, 2 Mo. App. 225.

After a prayer for an appeal, *Hatton v. Weems*, 12 Gill & Johns. 83.

After an appeal, unless moved for below, *Adams v. Müller*, 12 Ill. 27; *Robertson v. Comrs.*, 10 Ill. 559; *Coffey v. Collier*, 12 Ind. 565; *Cantelo v. Binns*, 2 Miles 86; *Ruckman v. Alwood*, 40 Ill. 128; *Howard v. Union Bank*, 7 Humph. 26; *People v. Common Pleas*, 1 Cow. 576; *Livermore v. Bond*, 19 Vt. 607; *Heflin v. Rock Mills Co.*, 58 Ala. 613; *Duncan v. Richardson*, 34 Ala. 117; *Ogg v. Leinart*, 1 Heisk. 40; *Comstock v. Clemens*, 19 Cal. 77; *Meyer v. Wiltshire*, 92 Ill. 395. See *McLean v. Isbell*, 44 Mich. 129; *Ripley v. Morris*, 7 Ill. 381; *Ranney v. Stringer*, 4 Bosw. 663; *Grant v. Banque, L. R.* (1 C. P. Div.) 143; *Smith v. Lockwood*, 34 Wis. 72; *Moore v. Great Western R. R., Co.*, 9 Irish C. L. App. vi.

In ejectment, applications after issue joined and before trial, have been deemed in time, *Den v. Wilson*, 2 South. *680; *Purvis v. Hill*, 2 Hen. & M. 614; *McDade v. Dajoe*, 1 Cham. (Can.) 18; but not after trial and verdict, *Jackson v. Bushnell*, 13 Johns. 330.

In some states, filing security at any time before trial is sufficient, *Cabell v. Payne*, 2 J. J. Marsh. 134; *Vance v. Bird*, 4 Munf. 364; *Lyons v. Long*, 6 Ala. 103; *Culley v. Laybrook*, 8 Ind. 285; *Sharp v. Miller*, 3 Sneed 42; *White v. Stafford*, Breese 67; *Stillman v. Dunklin*, 48 Ala. 175. Even after motion to dismiss for that cause, *Snowden v. McDaniel*, 7 Mo. 313; *Parks v. Goodwin*, 1 Doug. (Mich.) 56; *Dowell v. Richardson*, 10 Ind. 573; *Robinson v. Meyer*, 25 Ark. 79.

In Illinois it may be filed without leave of the court, *Baker v. Palmer*, 83 Ill. 568. See *Schaefer v. Waldo*, 7 Ohio St. 309; *Bullard v. Johns*, 50 Ala. 382.

After a time for filing security has been fixed, the court cannot extend it, *McCullum v. Massey*, 2 Bail. 606; *Portsmouth Works v. Iron Hills Co.*, 11 Bush 47; *Alabama R. R. v. Harris*, 25 Ala. 232; *Burke v. Dillingham*, 8 Rich.

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The rule is perfectly well settled that if a defendant takes any step in a cause, after he has notice that the complainant is a non-resident, he waives his right to security for costs. 1 *Dan. Ch. Pr.* 30; *Anon.*, 10 *Ves.* 287. Kinderley, V. C., in *Atkins v. Cooke*, 3 *Jur. (N. S.)* 283 (the case is also reported in 3 *Drew.* 694), said that the least step is a waiver. The following acts or steps have been held to amount to a waiver: Filing a demurrer, *Long v. Majestre*, 1 *Johns. Ch.* 202; taking an order for time to answer, *Goodrich v. Pendleton*, 3 *Johns. Ch.* 520; and obtaining an order extending the time within which the testimony should be closed, *Newman v. Landrine*, 1 *McCart.* 291. And it has even been held that where the defendant sent his answer to

256. See *Wright v. Haddock*, 7 *Dana* 253; *Haney v. Marshall*, 9 *Md.* 194; *Town v. Evans*, 11 *Ark.* 9; *Swainson v. Bishop*, 52 *Mo.* 227; *Wall v. Fairley*, 66 *N. C.* 385; *Ireins v. Mathis*, 11 *Humph.* 603; *Williams v. Connor*, 14 *S. C.* 621; nor order it filed within a shorter time than that limited by statute, *Shaw v. Webster*, 21 *Wis.* 129.

A continuance may be refused because the plaintiff filed his security so late that defendant was not ready to proceed, *Cox v. Hunt*, 1 *Blackf.* 146; but see *Jacobs v. Sale*, 1 *Va. Cas.* 123; *Hawkins v. Millbank*, 4 *Wash. C. C.* 285.

A court of error may reverse for an erroneous dismissal of a suit below, because security had or had not been filed, *Adams v. Miller*, 14 *Ill.* 71; *Beacon v. Shirley*, 9 *Sm. & Mursh.* 457; *Vance v. Bird*, 4 *Munf.* 364; *Crawford v. Kenley*, 7 *B. Mon.* 253; *Fogg v. Edwards*, 57 *How. Pr.* 290; *State, Fallon v. Layman*, 46 *Md.* 190; *Steamboat Empire v. Ala. Co.*, 29 *Ala.* 698; *Moore v. Banner*, 4 *Ired. Eq.* 293; *Whitsett v. Blumenthal*, 63 *Mo.* 479; *Norton v. Bennett*, 22 *Hun* 604; *Eastman v. Godfrey*, 15 *Kan.* 341; but not where the allowance of such application is discretionary, *Papineau v. Belgarde*, 81 *Ill.* 61; *Campbell v. Garratt*, 24 *Ark.* 279; *Petiteler v. Willis*, 99 *Mass.* 460; *Adams v. Reeves*, 76 *N. C.* 413; *Clapp v. Balch*, 3 *Me.* 216; *Perkins v. Reagan*, 14 *Ark.* 47; *Swan v. Matthews*, 3 *Duer* 613; *Modglin v. Slay*, 11 *Ark.* 693; *Davis v. You*, 43 *Ala.* 691; *Kelty v. Valle*, 66 *Mo.* 601.

A mandamus may lie to compel the inferior court to proceed aright, *Barnett v. Warren*, *Hardin* 172; *Cole's Case*, 28 *Ala.* 50; *Robbins's Case*, 29 *Ala.* 71. See *State v. Howe*, 64 *Ind.* 18.

The court should dismiss the rule, upon the defendant's application, *Mississippi R. R. v. Ballard*, 3 *Sm. & Marsh.* 606.

Plaintiff is entitled to the costs of the motion, if defendant move before demanding security, *Baillie v. De Barnelles*, 1 *B. & Ald.* 331; *Fletcher v. Lee*, 3 *Ad. & El.* 551.

The burden of showing that the motion is too late lies on the plaintiff, *Jones v. Jones*, 2 *Cr. & Jer.* 207.—REP.

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the clerk before he knew that the complainant was non-resident, but the clerk did not file it at once, and in the interval the defendant received notice of the complainant's non-residence, the filing of the answer after such notice, though the defendant believed it had been filed before, disentitled the defendant to security. *Dyott v. Dyott*, 1 Madd. 109. This ruling can only be defended on the ground that the clerk, in what he did, or omitted to do, should be regarded, not as a public officer, but as the agent of the defendant.

A proper regard for the rights growing out of an enlightened comity, requires the courts of this state to treat the citizens of other states or nations, who appeal to them for justice against our own citizens, with considerate liberality. A defendant, in case his adversary is non-resident, has an unquestionable right to security for costs, but inasmuch as it is a right which may be used to delay or obstruct justice, he should be required to insist upon it promptly, and to adhere to it persistently, or otherwise be held to have lost it.

In this case, I think it is clear that the defendant has taken such steps in this cause as, according to the settled rules of practice, disentitle him to security. The motion to dismiss cannot therefore, be denied.

ELIZABETH W. ALLEN et al.

v.

JOSEPH E. ALLEN et al.

1. Since the statute of 1880 (*P. L. of 1880 p. 255*), a personal decree for deficiency cannot, on foreclosure, be obtained against a mortgagor.

2. The grantees of the mortgaged premises who assumed the payment of the mortgage in their respective deeds, are, nevertheless, still liable to the mortgagee on their several assumptions, if a deficiency remain after foreclosure, and their liability may be enforced through an independent suit in equity.

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3. Municipal taxes assessed on mortgaged lands in Rahway, after the mortgage was given, are liens on the premises paramount to the mortgage.

The bill was filed September 8th, 1880, to foreclose a mortgage for \$1,000, dated May 1st, 1857, on lands in the city of Rahway. It asks for decrees for deficiency against some of the defendants, who became grantees of the mortgaged premises, subject to the mortgage, and with assumptions to pay and discharge it expressed in the conveyances made to them respectively. The bill also says that the city of Rahway claims to have some liens on the mortgaged lands, but alleges that such liens, if any, are subsequent to the mortgage. It does not state what the liens are.

An answer was filed for William Gibby, one of the grantees, denying his liability to a decree for deficiency.

An answer was filed for the city of Rahway, setting up that taxes for state, county and city purposes, assessed by said city on the lands in the mortgage, are liens on said lands, prior to the lien of the mortgage. The answer does not specify the taxes, or show in what years they were assessed, or for what sums.

A general demurrer was filed by Joseph E. Allen, one of the defendants sought to be charged with a decree for deficiency.

The cause being referred to Vice-Chancellor Dodd, was submitted to him upon the pleadings and written briefs.

Mr. Robert Allen, jun., for complainants.

Mr. William J. Gibby, for defendant William Gibby.

Mr. Garret Berry, for city of Rahway.

Messrs. Vail & Ward, for Joseph E. Allen.

DODD, V. C.

The complainants ask that Joseph W. Allen, the obligor and mortgagor, and William Gibby, Joseph E. Allen and others, who, as grantees of the mortgaged premises, assumed with their

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grantors to pay and discharge the mortgage, may be decreed to pay the deficiency, if any, of the mortgage debt, after applying thereto the proceeds of the foreclosure sale. That the obligor, Joseph W. Allen, is not liable to such a decree, was, settled by this court in *Newark Savings Institution v. Forman*, 6 Stew. Eq. 436. It was there held that the act of March 12th, 1880 (*P. L. of 1880 p. 255*), was not unconstitutional, though it deprived the complainant of the right to a personal decree against the obligor, for the reason that while the remedy previously existing in equity was taken away by the act, there remained the remedy of an action at law on the bond.

Against the defendants in this case, who are sought to be personally charged for deficiency, on the ground that they assumed with their grantors to pay the mortgage debt, and so became liable, in equity, to the holders of that debt, the above act has not been held to take away the right to a decree in equity, as in the case of the *Savings Institution v. Newark*, it was held to do in respect to the obligor. The equitable obligation against the grantees who so assumed the mortgage still remains, and may, I think, be enforced, but not in this suit to foreclose. The language of the act cannot be so construed as to prevent the holder of the mortgage from bringing a suit for that purpose, if a deficiency should be found to exist after foreclosure sale. The act prohibits a decree for deficiency only "in all proceedings to foreclose." To construe it as prohibiting the enforcement of an equitable obligation, enforceable nowhere else than in equity, would be to extend the act beyond its plain terms. The relief in equity is regulated, but not destroyed. The demurrer in the present case must, therefore, be sustained, and also, for the same reasons, the defence set up in the answer of the defendant William Gibby.

Assuming that the taxes referred to in the answer are liens upon the mortgaged premises (as they seem to be considered in the briefs), the question whether they are prior to the mortgage, and entitled to be first paid, is settled by the cases of *Trustees &c. v. Trenton*, 3 Stew. Eq. 667, and *City of Paterson v. O'Neill*, 5 Stew. Eq. 386. The charter of the city of Rahway (*P. L. of*

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1865 p. 499), read in the light of the above cases, manifests a clear legislative intention to make taxes, assessed after the execution of a mortgage, a lien on the premises against which they are assessed, prior to the lien of the mortgage.

There should be a reference to a master, to ascertain the amount due on the mortgage, and also the amounts due for taxes.

JOHN DEAN

v.

BENJAMIN ANDERSON et al.

1. The court will decree specific performance of a contract to give a mortgage upon lands, where the contract, although by parol, has been executed on complainant's part.

2. A party claiming to be a *bona fide* purchaser, must deny notice not only at the time of his purchase, but also before or at the time when his deed was executed and consideration paid.

BLOOMFIELD, C.

The object of this suit is to obtain the benefit of a certain agreement made between the complainant and Thomas Anderson, one of the defendants, by which Anderson agreed to make and execute to the complainant a mortgage on the premises mentioned and described in the bill, to secure the payment of the

NOTE.—This opinion of Chancellor Bloomfield must have been delivered about 1810, and is here inserted because none of his opinions seem to have been published, and also because the precise point of the case has never been decided in New Jersey. It is cited in *Stewart's Dig.* 1006 § 162 a, 1016 § 319 a.

Equity may decree the specific performance of a contract to give a mortgage, *Walker v. Barnes*, 3 Madd. 247; *Seaton v. Twyford*, L. R. (11 Eq.) 591; *Ashton v. Corrigan*, L. R. (13 Eq.) 76; *Herman v. Hodges*, L. R. (16 Eq.) 18; *Humble's Case*, 11 Irish Ch. 132; *Hunter v. Langford*, 2 Moll. 272; *Strand Music Hall Co. Case*, 3 De G. J. & S. 147; *Gould v. Hamilton*, 5 Grant's Ch

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sum of £700. Anderson has moved out of the state, and has not appeared or made any defence, and the cause has been heard as against the other defendants.

It is fully proved that, by a written agreement dated February 22d, 1809, Dean agreed to sell and convey to Anderson a certain estate situate at Bensalem, in the county of Bucks, and state of Pennsylvania, for the sum of £1,500. £375 thereof were to have been paid upon the 5th day of April then next ensuing, when a deed was to have been executed to Anderson, and the remaining part of the purchase-money secured by a mortgage on the premises; that Anderson, after having paid a part of the £375, made a proposal to one William Jackson to exchange with him the estate so agreed for at Bensalem, for a certain ferry, ferry-house and lot of land at Trenton, where Jackson then lived; and that soon after, Jackson, Dean and Anderson had a meeting on the subject, when it was agreed that Dean should convey the Bensalem estate to Jackson, and that Jackson should convey his estate at Trenton to Anderson; that Anderson should give his bond to the complainant, with a mortgage on the ferry property, to secure the payment of £700, part of the consideration-money, which Anderson had agreed to pay for the Bensalem property, and that Jackson should secure to the complainant the payment of the further sum of £518 15s. on the property to be conveyed to him; that in pursuance of this last agreement, Dean and wife, by their deed, dated August 21st, 1809, conveyed to Jackson the property at Bensalem, and Jackson and wife, by their deed, granted and conveyed the ferry property to Anderson, which deed Anderson immediately

192; *McKay v. Reed*, 1 Ch. Cham. 208; *Nichols v. Williams*, 7 C. E. Gr. 63; *Cole v. Dealham*, 13 Iowa 551; *McClintock v. Laing*, 22 Mich. 212; *Alexander v. Ghiselin*, 5 Gill 138; *Cole v. Cole*, 41 Md. 301; *Ogden v. Ogden*, 4 Ohio St. 182; *Robinson v. Cathcart*, 2 Cranch C. C. 590; *Johnson v. Slawson*, Bail. Eq. 463; *Richardson v. Hawlett*, 33 Ark. 237; *Laurence v. Laurence*, 42 N. H. 109; *Arnold v. Cord*, 16 Ind. 177. See *Jones on Mort.* § 163; *Thompson v. Clark*, 3 F. & F. 181; or, to charge lands with an annuity, *Lyde v. Mynn*, 4 Sim. 505, 1 Myl. & K. 683; *Wellesley v. Wellesley*, 4 Myl. & Cr. 561; *Woodburn v. Grant*, 22 Beav. 483; or, to assign choses in action to indemnify a surety or lender, *Shockley v. Davis*, 17 Ga. 177; *Triebert v. Burgess*, 11 Md. 452; *Brooks v.*

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delivered to Dean, and Jackson secured by mortgage the payment he was to make Dean, of £518 15s; that soon after the execution of the deeds, Anderson went to the house of Jackson, and there declared that he had the deed and mortgage, and that he did not intend to sign the mortgage, as Dean had injured him in the contract, for the property was not worth what he had agreed to pay for it, and that it would ruin him. It further appears that Anderson and wife, by deed bearing date the 26th of September, 1809, and for the consideration therein expressed of £400, conveyed the ferry property to Ross and Burrows, who gave their bond to Anderson for the purchase-money, payable on April 1st, 1810.

Thus far, there is no dispute between the parties as to facts. But it is contended on the part of the defendants, that Anderson's agreement to execute a mortgage on the ferry property at Trenton created no specific lien on that property, but only a legal obligation personally binding on him, and for the breach of which the complainant can have no remedy but an action at law for damages. When the subject matter of a contract is real estate, and a sum in damages, which is the only remedy afforded by a court of law, is not an adequate remedy for the non-performance of such contract, a court of chancery will grant relief specifically (*3 Atk. 387*), but in general it will not entertain a bill for the specific performance of contracts which relate to chattels or articles of merchandise, but leaves the injured party to his remedy at law, which is much more expeditious. An

Ruff, 37 Ala. 371. See Jones on Chat. Mort. § 3; Cess v. Bramley, 18 Hun 187; Collins v. Buck, 63 Me 459; Tiernan v. Granger, 65 Ill. 351; Moseley's Case, 2 Moll. 454; or, a parol contract to cancel a mortgage, Bennett v. Abrams, 41 Barb. 619; Malins v. Brown, 4 N. Y. 403; Weir v. Mundell, 5 Brewst. 594; Stark v. Wilder, 36 Vt. 752; Barkley v. Barkley, 14 Rich. Eq. 12; Ackla v. Ackla, 6 Pa. St. 228; Neal v. Speigle, 33 Ark. 63; but not a contract to borrow a specified sum of money on a mortgage, Rogers v. Challis, 27 Bear. 175; or, to make a loan, in default of performing an agreement, Sichel v. Mosenthal, 30 Bear. 371. See Goodrich v. Nichols, 2 Root 498; or, to deposit a collection of paintings with an auctioneer for sale, to re-imburse him for advances, Chinnoek v. Sainsbury, 6 Jur. (N. S.) 1318. See, further, Canadian Law Journal, March, 1880.—REP.

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agreement for a mortgage on lands is not a mere personal contract, but affects the realty, and the spirit and justice of it require a specific performance. A party requires security by mortgage because he is unwilling to trust to the personal responsibility of the person with whom he agrees, and to refuse him a remedy against the estate agreed to be mortgaged, is to deprive him of the principal security on which he relied, and to leave him to a remedy which he was unwilling to trust to, and which, in most instances, would not answer the justice of the case. It was on the faith of this property as a security for the sum of £700 that Dean was induced to convey his estate to Jackson, and to give up his agreement for a mortgage on the estate he sold, and in conscience and equity the agreement of the parties is equivalent to a mortgage. It is the object of this court to give to every agreement that effect which it was intended to have, and to consider that as done which, for a valuable consideration, is agreed to be done, and I can see no good reason why a court of equity should not decree a specific performance of an agreement for a mortgage on real estate as well as that of an agreement for a loan. In *Martin v. Seamore*, 1 Ch. Cas. 170, it was decreed that a copyholder having for money agreed to mortgage lands, he stood seized in trust for the person to whom he had agreed to mortgage, and the lands were held liable in a suit against a person claiming under a voluntary surrender. S. C., 2 Com. Dig. 664, tit. "Chancery" 471. So, in *Matthews v. Cartwright*, 2 Atk. 347, one Thomas Matthews gave the plaintiff, at different times, three promissory notes for money loaned, and expressed in each "to be secured by a mortgage on my Stoke Hall estate." The drawer of the notes had before mortgaged the estate to the defendant, and had also given a prior mortgage to another person. The plaintiff purchased in the prior mortgage to protect the sums lent by him. It was decreed by Lord Hardwicke that the plaintiff should be protected against the defendant's mortgage, and should be paid the money lent upon the notes, as well as what was due to him upon the assignment of the plaintiff's mortgage. This case was decided upon the ground that the notes were evidence of an agreement to secure the money lent

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by a mortgage on the Stoke Hall estate, and the court considering that as done which, upon a bill for a specific performance, they would have decreed to be done, it was not to be distinguished from the common case of a puisne mortgagee purchasing in a prior mortgage to protect himself. And an engagement by letter to make a mortgage has been held to be a specific lien against creditors. *3 Ves. jun. 575, 582.* And if a specific lien against creditors, certainly it will be enforced as a specific lien against the party himself, and those who are here considered as standing in his place and liable to the same equity. These cases prove that an agreement in writing for a mortgage will be carried into execution by the court, and if an agreement in writing will be enforced, so will a parol agreement, unless made void, and defeated by the statute of frauds. This leads me to consider in the next place whether there are any circumstances in this case to take it out of that statute. The parol agreement for a mortgage on the ferry property is a clear subsequent agreement to that of the 22d of February, 1809, and the terms of it are distinctly and fully made out in evidence; and it as fully and clearly appears that this subsequent agreement has been fully executed on the part of the complainant. Where an agreement has been executed or in part performed by the complainant, and the acts done place him in a situation which is a fraud upon him, unless the agreement is executed, equity will not permit the defendant to protect himself from executing his part of the agreement, by pleading that it was not in writing. The ground upon which this court acts in cases of part performance is fraud in refusing to perform after performance by the other party, and the court will interpose and grant relief, notwithstanding the statute, when the complainant shows a performance on his side, by which he would suffer an injury amounting to fraud by the refusal to execute the agreement on the part of the defendant. *Ambler 586; 2 Atk. 100; 1 Sch. & Lef. 41; 7 Ves. 341, 346; 14 Ves. 386; 1 Johns. Ch. 149.* I cannot well imagine a stronger case for relief, on the ground of part performance, than the present. The agreement having been made, Dean, in pursuance thereof, conveyed his estate at Bensalem to Jackson, and Jack-

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son at the same time conveyed the ferry property to Anderson, after which Anderson, in fraud of his agreement, refused to execute the mortgage, and held the property which he had thus obtained. This refusal was, in my opinion, a gross and palpable fraud on Dean, and the case comes clearly and fully within the principle upon which the court relieves in cases of part performance. The complainant, relying on the agreement, parted with his estate at Bensalem, and waived the security by mortgage which he was to have had on that property; he has therefore done an act in execution of the agreement, by which he is greatly prejudiced, and is entitled to say that the non-execution of the agreement by Anderson is a fraud on him. This case is strongly analogous to the one in the books, where there was a parol agreement for a mortgage, and a deed was to be executed and a defeasance, and, after executing the deed, the grantor refused to execute the defeasance, and, on a bill filed, relied on the statute of frauds, which was held to be no bar. *1 Eq. Cas. Ab.* 20 § 5; *S. C., Prec. in Ch.* 526. This was a decree of Lord Nottingham, and is said to have been the first case, after the statute, in which relief was granted upon the ground of part performance.

It appears from the evidence of William Jackson that when he executed the deed to Anderson, it was delivered to him and that he immediately delivered it to Dean. It does not appear that anything was said on the delivery of the deed by Anderson to Dean. If the complainant had charged in his bill that the deed was deposited with him as a security for the £700, and upon an agreement that he should hold it until the execution of the mortgage to him by Anderson, according to some modern decisions in the books, the evidence would be sufficient to make out a case of an equitable mortgage or lien by the deposit of the title deeds, notwithstanding the statute of frauds. *Birch v. Elkames and Gorst*, 2 *Anstruther* 427; *Hiern v. Mill*, 13 *Ves.* 114; 1 *Madd. Ch.* 428. But as it is not so charged in the bill, the complainant cannot be relieved on this ground. I am, however, decidedly of the opinion that the acts done in performance of the agreement take the case out of the statute.

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It has also been further contended by the defendant's counsel that the complainant has not proved all the allegations in his bill, and that he has not made out his case by proof as he has stated it in his pleadings, and that therefore he ought not to be relieved in this suit. The complainant, in his bill, alleges that he agreed to the exchange between Anderson and Jackson upon the terms that on Jackson's executing the deed to Anderson, it should be lodged in the complainant's hands as an escrow, until Anderson executed the mortgage, and that Anderson afterwards obtained the deed from the complainant, under pretence, that he wished to show it to his wife, and that when she got it into her hands, she locked it up and refused to return it to the complainant. These allegations are not proved. It is in evidence that the deed was delivered by Jackson to Anderson, and by him to Dean, which disproves the charge that it was delivered as an escrow, for a deed cannot be delivered as an escrow to the grantee himself, but must be delivered to a third person, to take effect upon the performance of the condition upon which it is delivered; nor does it appear in evidence how Anderson obtained the deed from Dean, except from the declaration of Anderson himself to Jackson, that it was given to him by Dean to go to Burlington and get the mortgage executed. But the complainant's failing to prove these allegations does not, in my opinion, affect his right to relief. If they were struck out of the bill, the remaining charges would be sufficient to sustain the relief prayed for. In *Spurrier v. Fitzgerald*, 6 Ves. 548, 554, the master of the rolls says:

"I take it not to have been ever established that a plaintiff is bound to prove all the allegations of his bill with so much strictness and precision as a plaintiff at law is obliged to prove his declarations. It is sufficient here if the plaintiff proves the substance of his bill."

He then goes on to define that evidence of an agreement of a different import or tendency would not support the bill, but that evidence of a written agreement will support the allegation of a parol agreement, or evidence of a parol agreement, the allegation of a written agreement.

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As between Dean and Anderson, this is the common case of a bill for a specific performance of a contract actually executed on the part of the complainant, and is one of the most ordinary subjects of relief, and on the part of Anderson it would be impossible to support any objection to a specific performance of it. If he made an improvident bargain, it was his own folly; he labored under no incapacity or deficiency of judgment, nor does it appear that he was influenced by accident or design into a misapprehension of the value of the Bensalem property, and after having exchanged it for another estate, it does not lie in his mouth, nor in the mouths of those who claim under him, to question the value of it.

I shall now proceed to consider the case as it respects Ross and Burrows. It is contended, on their part, that they are *bona fide* purchasers for valuable consideration, without notice of the complainant's equitable lien, and that therefore equity will not afford the complainant any assistance against them. In all cases where a party means to defend himself on the ground of being a *bona fide* purchaser, he must deny notice before the execution of the deed to him, and previous to the payment of the consideration-money. *Milf. Eq. Pl. 216*; *Coop. Eq. Pl. 282*. And he must deny notice, though it be not charged in the bill. *1 Vern. 197*; *3 P. Wms. 244 n. (F)*; *1 Johns. Ch. 302, 575*; *2 Madd. Ch. 255*; *2 Atk. 495*.

In this case, the defendants' denial of notice is altogether evasive and unsatisfactory. Instead of plainly and distinctly denying notice of the agreement for a mortgage on the premises in question previous to the execution of the conveyance, and which was the most material and essential matter to be denied with precision, they only deny that at the time of their purchase, or at any time before, they had notice that the deed from Jackson to Anderson had been delivered to the complainant to be kept as an escrow until the bonds and mortgage mentioned in the bill should be executed, or that they knew that the deed had been obtained by Anderson out of the hands of the complainant by fraud, or that it had been in the possession of the complainant, or that they knew, at the time of their purchase, or at any

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time before, that the deed to Anderson was not to have any force or effect in the law until Anderson had given and executed his bond and mortgage to the complainant, or that they knew that the complainant had filed a caveat against recording the deed to Anderson. And they "say and insist that they are fair and *bona fide* purchasers of the said premises, situate in the said township of Trenton, for a fair and valuable consideration, without notice or knowledge of any fraud in the said Benjamin Anderson respecting the same, or of any claim, charge or lien of the said complainant therein." They do not, in any part of their answer, say that *before* or *at the time of their purchase*, they had no notice of the agreement for a mortgage or claim of the complainant on the premises purchased by them. Besides, the term *purchase* is ambiguous; it may be understood as alluding to the time of the agreement to purchase, and not to the time of executing the deed. In *More v. Mayhow*, 1 Ch. Cas. 34, when the defendant denied notice at the time of the *purchase*, it was held that the word *purchase* might be understood when the contract for the purchase was made, and it might be that he had no notice then, and might have notice after and before or at the time of sealing the conveyance. And in *Hoover v. Donally et al.*, 3 Hen. & Munf. 316, it was decided by the supreme court of appeals of Virginia that in a suit against a person alleged to be a purchaser with notice, it is not sufficient for the defendant, in his answer, to say that he had no notice of the complainant's equity at the time of the *purchase*, and that it must appear whether he had obtained a *conveyance* before he received notice of the plaintiff's claim. The only safe rule in pleading is, that whatever is essential to the defence relied on must be clearly and distinctly alleged. And the rule is now well established that the defendant must deny that he had notice *before or at the time of the execution of the conveyance to him*. 2 Atk. 397, 631; Milf. Eq. Pl. 216; Coop. Eq. Pl. 282; 2 Madd. 255. It seems that formerly the defendant was not obliged to discover even his purchase-deed. Sugden 508 n. (2). But it is now the established doctrine of the court that the defendant must state his deed of purchase. Sugden 508; 3 Atk. 302; 3 Ves. 396; 2

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Madd. Ch. 255. The precedent cited from *2 Eq. Pl. 10*, is not to be relied on, and is not agreeable to the present practice of the court.

But it is not necessary to decide the cause on the insufficiency of the answer on this point, for the evidence I consider sufficient to fix notice on Ross and Burrows before the execution of the deed to them, and previous to the payment of the consideration-money.

Abram Chapman, a witness for the complainant, testifies that, on the 30th of August, 1809, he, as an attorney-at-law, brought a suit for Dean against Anderson, in the common pleas of Bucks county; that, some time after, Burrows, who was under-sheriff in that county, and had arrested Anderson at Dean's suit, applied to witness to know whether he, Burrows, could with safety take Anderson to Burlington; that at this time Dean, Burrows and witness conversed together on the subject of taking Anderson to Burlington to execute a mortgage on the ferry property to Dean; that the next day Burrows told witness that they had been to Burlington and applied to David Griggs to draw the mortgage, who declined doing it, as they could not furnish him with the courses and distances; that these conversations took place about the first or second week in September, 1809. This witness is strongly corroborated by the testimony of Dr. Amos Griggs, who says that Dean, Anderson and Burrows called on him in September, 1809, to fill up a mortgage, which was not done, because they had not the original papers; that Dean said Anderson had been taken out of jail for the express purpose of executing a mortgage to him. Here we have evidence of distinct notice to Burrows, before the execution of the conveyance, of Dean's demand against Anderson; that Anderson was fined and imprisoned by Dean for not complying with his contract, and that Anderson was about giving a mortgage on the ferry property to secure the money he owed Dean. This notice was at least sufficient to put them on inquiry before they purchased the property; and whatever is sufficient to put the party upon inquiry, is good notice in equity. *1 Vern. 363; 1 Atk. 490; Ambler 313; 2 Fonb. Eq. 155 n. (M).*

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As if the purchaser is told that particular parts of the estate are in the possession of a tenant, without any information as to his interest, and taking it for granted it was only from year to year, he is bound by a lease, which the tenant had, which was a surprise upon him. *2 Ves. jun. 440.*

It is further proved by William Jackson, that when Ross applied to him to sign a lease acknowledging that he held the premises under Ross and Burrows, the witness at first objected to signing the lease, and said that he expected censure from Dean if he signed it; that Ross told the witness that he need not be afraid to sign it; that he or they (the witness does not recollect which) would satisfy Dean. Was this the language and conduct of a man who had purchased without notice of the complainant's equity? Certainly not. If he had been a *bona fide* purchaser, without notice, he would have expressed some indignation against Anderson, or some surprise at finding a claim on the estate that he was ignorant of at the time of his purchase, and made some inquiry respecting it; but, instead of doing this, his language is that of a man who knew of the claim, and expected to be answerable to Dean for it. Margaret Jackson, in her examination, says that, not long after, Anderson was there, and told her husband that he did not mean to execute the mortgage. Ross came and conversed with her husband respecting the business; that he was several times there, and that Burrows was there also two or three times; that she remembers to have heard Ross talk with her husband about Dean's claim, but does not recollect what he said on the subject, but that it appeared to her that he knew all about it; that the first time Ross came to her husband, was about two or three weeks after Anderson had been there, and said that he did not intend to sign the mortgage. James Jackson and Lydia Jackson, in their examination, say that, at the time of signing the lease, Ross said he intended to pay Dean his money. As these two witnesses were quite young when the transaction of which they testify took place, they are not to be relied on for the exact expression made use of, but there is no doubt, from all the evidence as to the conversations between Ross and Jackson, that Dean's claim was talked of, and that

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Ross, so far from pretending that he was ignorant of it, declared that *he or they* would satisfy Dean, or pay Dean his money—the exact expression is not very material ; and when we connect this evidence with the evidence before stated, of Burrows's going to Burlington with Anderson for the express and sole purpose of Anderson's giving the mortgage to Dean, the mind is irresistibly led to the conclusion that they had notice of this claim at the time of their purchase.

Besides the evidence which I have stated, there are several circumstances extremely unfavorable to the fairness of the purchase of Ross and Burrows. They purchased from a man in jail for the non-performance of this very contract, and immediately after became his bail. They purchased for the consideration of £400, which appears from the evidence not to have been more than the one-half of the value of the property, and in addition to those circumstances the haste which they manifested to obtain a lease from Jackson recognizing their title, cannot but excite a strong suspicion that all was not fair.

But if a doubt remains on the question whether Ross and Burrows had notice before the execution of the conveyance to them, there cannot be any that they had notice before the payment of the purchase-money, for it is not only fully proved by the evidence in the cause that they had such notice, but it is not even denied in the answer, and they must therefore be considered as holding the premises subject to that equitable encumbrance. A purchaser with notice is liable to the same equity, and in the same manner, and to the same extent, as the person was of whom he purchased. *Sugden* 484; *2 Eq. Cas. Ab.* 32 pl. 43, and *n.*; *2 Ves. jun.* 439.

But it has been contended, on the part of the defendants, that if Ross and Burrows obtained their deed before notice of this encumbrance, although they received notice before the payment of the purchase-money, the estate is no further liable than to the amount of the money they were to pay, without any regard to the actual value of the estate, and the case of *Frost v. Beekman*, 1 *Johns. Ch.* 288, has been cited in support of this position. In that case, a mortgage was given to secure

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the payment of \$3,000, but by mistake registered for \$300 only. It was held by Chancellor Kent that the registry of a mortgage is notice to all subsequent purchasers or mortgagees to the extent *only* of the sum specified in the registry ; but that notice of the true sum gave the complainant an equity as against the purchaser for the money that remained due at the time of the notice, and that all payments after notice were made by the purchaser in his own wrong. The principle now contended for was not laid down by the chancellor in that case, and it is believed that no case or *dictum* can be found to support it, nor can it, in my opinion, be the general rule of equity, for if the court will not inquire whether the consideration is adequate, but only whether it is valuable, as was decided by Lord Bathurst, in *Bullock v. Sadlier*, *Ambler* 763, it is obvious that many cases may arise where equity would not be done between the parties, and where the purchaser would be greatly benefited by the fraud of the vendor, and the person having a prior equity greatly injured, without the possibility of redress. Where a thing, for a valuable consideration, is agreed to be done, a court of equity considers it as done, and therefore, from the time of an agreement to purchase, and the money paid, this court considers the estate as the property of the purchaser. A purchaser before conveyance is, in equity, owner of the estate, almost to every purpose. *2 Ves. & B.* 387. But if, before the execution of the agreement, the vendor sells and conveys to a *bona fide* purchaser, and the money is paid, without notice of the prior agreement, this court will give no assistance against such purchaser, for he has equal claims upon the equity of the court with the other party, and having the law on his side, the court will not take it from him. But if the subsequent purchaser has only obtained a deed, but has not paid his money, although he has given his bond to secure the payment of it, he has not the same equitable claim to the protection of the court that the other has to relief, for the money may never be paid, and therefore, in that case, the court will interpose and grant relief. *3 Eq. Cas. Ab.* 685 *pl. 9* ; *3 Atk.* 304 ; *2 Atk.* 630, 631 ; *Sugden* 487 ; *Coop. Eq. Pl.* 282. The same principle must apply to encumbrances ; and

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if a purchaser has obtained his deed, but receives notice of an equitable encumbrance before the payment of the purchase-money, the estate remains subject to the encumbrance, for the purchaser has not an equal claim upon the equity of the court. In *Tourille v. Naish*, 3 P. Wms. 307, it was held by Lord Talbot, if the person who has a lien in equity on the premises gives notice before actual payment of the purchase-money, it is sufficient. And in *Wigg v. Wigg*, 1 Atk. 382, where the purchaser did not know of an encumbrance before he paid his money, yet, as he knew it before the deed was executed, Lord Hardwicke held the estate liable to the whole amount of the encumbrance.

From a careful examination of the evidence, I am of the opinion that Ross and Burrows had notice of the complainant's equitable lien before the execution of the conveyance to them, and previous to the payment of the purchase-money, and therefore decree:

1. That the ferry, ferry-house and land, situate at Trenton, and conveyed by Jackson to Anderson, are subject to and chargeable with the amount due the complainant from Anderson on the sale of the Bensalem property, not exceeding the sum of £700, with interest from the time of the agreement for a mortgage on the said ferry property.

2. That it be referred to a master to ascertain and report the amount due the complainant from Anderson as aforesaid at the time of making the agreement for a mortgage on the said ferry property, and at the time of making his report, and that if the sum due at the time of making the said agreement exceeds £700, that the master also report the amount of interest due upon £700 from that time to the time of making his report.

3. And that all further questions be in the meantime reserved.

CASES
ADJUDGED IN
THE PREROGATIVE COURT
OF
THE STATE OF NEW JERSEY,

OCTOBER TERM, 1881.

THEODORE RUNYON, Esq., ORDINARY.

CATHARINE E. COLLINS et al.

v.

ABRAM J. OSBORN et al., exrs.

A testator eighty-five years old when he died, and blind for the last fifteen years of his life, lived for many years and until his death with one of his sons, who took care of him. He left two sons, several daughters and grandchildren surviving.—*Held*, no evidence of incapacity that he gave all of his land to his two sons, charged, however, with legacies to his daughters and grandchildren, although, by a codicil executed three years before his death he reduced all of the legacies, because he apprehended that the legacies and his own debts would prove too great a burden for his sons, when, in fact, at that time, a part of his lands had increased considerably in speculative value; nor the omission of some of his grandchildren from his bequests, nor the fact that the disposition of his property is grossly unequal.

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Appeal from decree of Monmouth orphans court.

Mr. W. H. Vredenburg, for appellants.

Mr. C. Haight, for respondents.

THE ORDINARY.

This appeal is from the decree of the orphans court of Monmouth county, admitting to probate three instruments of writing (a will and two codicils) as the will of James Osborn, deceased, late of that county. The testator died on the 11th of June, 1880. He was then over eighty-five years old. For many years before his death he had been blind. The will in question was made December 19th, 1872; one of the codicils, August 5th, 1876, and the other, August 17th, 1877—so that the will was made seven years and a half before his death; the first of the codicils about four years, and the other about three years. He had outlived some of his children, both sons and daughters, and the surviving daughters had married and gone away from him. For many, about fifteen, of the last years of his life he was blind and wholly dependent (he was a widower) on his two surviving sons, Abram and Andrew (especially the latter), for the necessary attention to his physical wants. He always lived on his farm, which bordered on Squan river. He made a will in 1870 (drawn by Mr. A. R. Throckmorton), which is in evidence. In 1872, he made the will in dispute. By it he gave to Abram, by metes and bounds, part (fifty-five and twenty-nine hundredths acres) of his farm, excepting thereout the family burying-ground of about half an acre, for a burial place for his family and their descendants forever. The devise was, however, subject to the payment, in one year after his decease, of a legacy of \$300 to his daughter Mrs. Herbert, which he charged thereon. To his son Andrew he gave, by like particular description by metes and boundaries, another part, about one hundred and three acres, of the farm, subject to the payment of legacies, payable in one year from his death, thereby charged thereon, one of \$500 to

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his daughter Mrs. Collins, and the other of \$300 to his daughter Mrs. Day, who was then living, but died May 15th, 1879. He gave to Abram and Andrew also a tract of pine land and cedar swamp of about twenty-three acres, which he described, on the south side of Squan river, in Brick township, Ocean county, owned by him, together with a certain other designated cedar swamp on the south side of Beaver Dam creek in that township. He empowered his executors to sell all the rest of his real estate and pay his debts out of the proceeds. He then gave to his daughter, Mrs. Twitchell, a legacy of \$300, to be paid to her in one year from his death, out of those proceeds, if sufficient for the purpose, but if not, then he directed that it be paid by Abram and Andrew, and charged it on the land devised to them. He then gave \$100 apiece to Edwin, Marion, Winfield and William Osborn, the four children of his deceased son Benajah, to be paid in one year, and payable out of the proceeds of the land ordered sold, if sufficient, but if not, then by Abram and Andrew, and he charged those legacies on the land devised to them. He then directed that the residue of his real estate be sold, and ordered that his debts be paid out of the proceeds of the sale, and gave to Abram and Andrew the residue of his estate after paying his debts, funeral expenses and the expenses of settling his estate, and the legacies to Mrs. Twitchell and Benajah's children, and provided that any deficiency in paying those debts, expenses and legacies should be chargeable on the land devised to them.

He made Abram and Andrew his executors. By the first codicil, which was made about three years and a-half after the making of the will, he ratified the will except as altered or changed thereby, and gave to Ann, daughter of his deceased son George, a legacy of \$400, payable in one year from his death, out of the proceeds of his real estate ordered to be sold, charging it, in case of deficiency, on the land devised to Abram and Andrew.

By the last codicil, made August 17th, 1877, about a year afterwards, he states that his indebtedness is such as to render a change in the will and previous codicil necessary, in his opinion, and, ratifying those instruments except as changed thereby, he

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reduced the amounts of the legacies as follows: Mrs. Herbert's from \$300 to \$200; Mrs. Collins's from \$500 to \$200; Mrs. Day's from \$300 to \$200; Mrs. Twitchell's from \$300 to \$200; the legacies to the four children of Benajah, from \$100 each to \$50 each; and the legacy to Ann, daughter of George, from \$400 to \$100. The reductions together amounted to one-half of the gross amount of the legacies: that is, they were reduced from \$2,200 in the aggregate, to \$1,100.

That the testator, at the time of the execution of each of these instruments, was possessed of competent testamentary capacity, is proved beyond all doubt. To his execution of all of them, his friend and neighbor and family physician, Dr. Robert Laird, was a witness, and his execution of the will and the last codicil was witnessed by Mr. A. R. Throckmorton, the lawyer by whom all the instruments were drawn. They two were the witnesses to the will. To the first codicil, Dr. Laird and John D. Warner, now deceased, were witnesses, and the execution of the last codicil was witnessed by Dr. Laird, Mr. Throckmorton and Joseph Thompson. The instructions for drawing all these instruments were received by Mr. Throckmorton from the testator himself, and under circumstances leading to the conviction that the testamentary acts were the result of the deliberate and free action of the testator's mind and will. Dr. Laird was his next neighbor. He had known the testator for nearly half a century, and had been his family physician for about forty years, and was intimately acquainted with him for all that time. Mr. Throckmorton had known him personally and intimately for about twenty-five years. Mr. Thompson, who is one of the witnesses to the first codicil, knew the testator well. He was, at the time when that instrument was signed, living on the farm as a tenant on shares, and had been so for about five months, and during all that time had, with his family, occupied part of the house, while the testator and his son Andrew occupied the other part. The testamentary witnesses, then, were all well acquainted with the testator, and, consequently, were able to judge of his capacity at the time of doing the testamentary acts under consideration. Dr. Laird, in his testimony, says that, during the last ten years

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of the testator's life, he had frequent conversations with him ; that they talked on general subjects and on business matters, and the testator's own business ; that the testator talked to him about his wishes in the disposition of his property ; that, during those ten years, he always found him a strong-minded man ; that his mind was clear—as clear as anybody's ; that he thinks his memory was very good—rather extraordinary ; that he had conversations with him at the time the will and codicils were executed, and he thinks his mind and memory were perfectly good at the time when he executed those instruments ; that he had always been intimate with the testator and his family ; that the testator was always considered a very firm man, and he considered him so himself ; and he adds that he thinks that that characteristic continued up to the time of his death. It appears that the testator communicated to him his wish to make the will and the codicils, and, through him, communicated to Mr. Throckmorton his desire that he would come and see him for the purpose of drawing those instruments. Mr. Throckmorton has been a practising lawyer for about thirty-eight years. The will and codicils were, as before stated, all drawn by him, and they are all in his own handwriting. He had, as already mentioned, drawn a will for the testator in 1870. He says that, on the day the will in question was executed, he went to see the testator, in pursuance of the latter's request communicated to him by Dr. Laird ; that, after talking with the testator on general subjects, the testator told him he wanted to change his will, and, in reply to his inquiry, told him what changes he wanted to make ; that he then made a memorandum of them, and then and there, in the presence of the testator, and entirely under his directions and instructions, drew the will ; that after he had drawn it, he read it over to the testator, and asked him if it was satisfactory to him, and he replied that it was ; and it was then executed. He says no one else besides the testator and Dr. Laird (whom he had taken with him to witness the will) and himself were in the room, and that he was there two or three hours. He says the testator's mind was, in his judgment, sound, and that, from his observation and knowledge, the testator was entirely

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competent to execute the will. In like manner, he received his instructions from the testator for the first codicil, at the house of the latter, but, for want of time, did not draw it there. He drew it at his office in Freehold, and sent it to Dr. Laird, with directions as to the way in which it was to be executed, and, as before stated, the execution of that instrument was witnessed by Dr. Laird and Mr. Warner. Before it was executed, Dr. Laird read it over to the testator, and he approved it, and said it was what he wanted done. Mr. Throckmorton also took his instructions for the last codicil from the testator, at the testator's house, and drew it there, and after he had drawn it, read it to the testator, and asked him if it was satisfactory to him, and as he wished it to be, to which the testator replied that it was; and it was thereupon executed. He says that, at the time of drawing the will and codicils, the testator's mind and memory were, in his opinion, entirely sound. He also says, in view of the testator's age and infirmity (his blindness), he took pains to ascertain the condition of his mind and memory before drawing the will and codicils; that his mind seemed to be clear and his memory good, and that when the testator gave him his instructions for drawing the first codicil, the testator told him he had changed his mind with regard to one of his grandchildren, the daughter of his deceased son George—that he had at first thought that he would not give her anything, but had concluded to give her a small legacy. The gift of that legacy is the only change made by that codicil in the disposition of his property made by the will. He further says that, when the last codicil was made, the testator told him that he wished to make changes in the legacies he had given, and stated what they were, and gave, as his reason, that he was afraid the boys would not be able to pay the debts and legacies and retain the property, and that he did not want the property to go out of the family.

There is also the testimony of other witnesses, besides those who witnessed the execution of the instruments, to the testator's competency. Elias Allen, called for the caveators, testifies to a business transaction (the renewal of the testator's note, which he held) which he had with the testator about a year

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before the latter's death. He says that he and the testator both talked much and fast, on the occasion; that the latter knew what he was talking about, and seemed to understand the subjects on which he conversed; that the testator acknowledged that he owed him, and expressed a desire to pay him; that they were an hour together; that he talked to him about a neighborhood matter, before the testator's son Andrew came in, and his mind appeared to be, as the witness expresses it, "as clear as a bell." This witness was a near neighbor of the testator, and owned a farm adjoining that of the latter. He is sixty-eight years of age, and was a relative of the testator, and had known him all his life. Allen Osborn, also called for the caveators, was also a near neighbor, and was a relative (a nephew) of the testator. He is sixty-nine years old. He says he was at the testator's house between four and five weeks before he died, and again about a week before his death, and he had seen and conversed with him, and spent part of the day at his house, about three years previously. He says the testator was a strong-minded, energetic man, and that his mind was good and clear till he died. Charles Osborn, sworn for the proponents, was also a neighbor (living on an adjoining farm) of the testator. He is fifty years old, and was, he says, always intimate with the testator, and saw him frequently during the last fifteen years of his life. He says he visited him occasionally, every month or so, he supposes, and sometimes, perhaps, two or three times a month; that on the occasion of the visits he talked with him about business and other matters; that he sometimes stayed an hour and sometimes half an hour, and would converse with him; that he never saw him when his mind was not as good as ever it was, for aught that he could see; that his memory was good, and in the different conversations which he had with him, the testator was always rational and clear; that he always seemed to be cheerful when he saw him during the last ten years of his life, and that he was a firm and decided man—very much so—and retained those characteristics up to his death.

John A. Osborn knew the testator for thirty-five years. He boarded in the testator's house with Andrew for about six

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months in 1878, and about seven or eight months in 1879, and saw the testator every day during those periods. He says he does not think he ever saw him when he was not rational; that his memory was very good; that during the last ten years of his life he had a clear mind and retentive memory, and that he thinks he was as firm and self-willed a man as he ever saw. Forman Osborn was a nephew of the testator, and knew him for forty years. He went to see him about once or twice a year up to the time of his death, and would stay an hour or two, or three. He says his mind was all right and his memory good; that he was a pretty strong-minded man, and, he should think, firm and decided. To say the least of it, the evidence of his capacity is in nowise shaken by the testimony adduced with a view of proving the contrary. Nor is there any evidence of undue influence or imposition or artifice of any kind. The instruments were executed with all due legal formalities. It is evident that at the time of making the will and codicils the testator not only fully understood the business in which he was engaged, but knew what property he had, and had mind and memory sufficient to enable him to dispose of it intelligently. He knew what his property was, and to whom he was giving it.

It is urged, however, on the part of the caveators, that he did not know or appreciate the value of his farm; that it was worth a very large sum of money, and that the fact that by the last codicil he, under the apprehension that his sons would not be able to pay his debts and those legacies (which were small in comparison with the value of the property) as they stood, and retain the property, reduced the legacies to his daughters and the grandchildren to whom he had made bequests, is evidence of want of capacity. And it is also urged that the fact that he gave no legacies to, and made no mention of, the children of some of his deceased children, and the fact that his disposition of the property is grossly unequal, are evidence in the same direction. To consider the first of these objections: There were at the testator's death three mortgages on the homestead property; one originally for \$2,750 and interest, given in 1869, on which he appears to have paid \$400; another of \$150 and the

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other of \$300. Apart from the speculative value (which is probably a real and very considerable one) which has of late been given to that part of the farm which lies on the Squan river, by reason of its eligibility for summer residences, the farm appears not to be very valuable. One of the witnesses says that the part of it which adjoins his land is not worth \$5 an acre now. It is apparently a small part, however. According to the testimony, the property now is worth from \$10,000 to \$20,000, and perhaps much more. But, in considering this objection, it is to be remembered that it was the testator's expressed wish to keep the property in the family. Mr. Throckmorton says that when he received his instructions for the last codicil he asked the testator "why he was cutting the girls down—if he could not give them more;" and the testator said that, "taking the valuation of the real estate, and the amount of his indebtedness, and the amount of the legacies, he was afraid he was overloading the boys, and he was afraid they would not be able to keep the farm; the encumbrance would be too heavy, and they would be obliged to sell it, and he did not want it to go out of the family." He further says that he spoke up for the girls, but the testator seemed fixed, and he adds that he thinks he understood the valuation of his property.

The testator seems to have intended to leave his farm to his sons before the will in question was made. By the will of 1870, he gave it to his then three sons, Abram, Andrew and George, but between that time and the making of the will of 1872, George died. By the will of 1870, he gave to Abram the same part of the homestead farm given by the will of 1872, subject to a legacy of \$300 to Mrs. Herbert. He gave to George, subject to a legacy of \$300 to Mrs. Twitchell, another part of it, seventy-five and twenty-six hundredths acres, and a small island, known as Osborn Island, containing about three acres of upland (including shore about seven acres), and another tract of about twenty-three acres, and to Andrew he gave, subject to a legacy of \$950 to Mrs. Collins, and one of \$450 to Mrs. Day, the same part of the homestead farm, about one hundred and three acres, given to him by the will of 1872.

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The cedar swamp he gave to the three sons, and he gave them the residue of his property, subject to his debts and funeral expenses and the expenses of settling his estate, directing that they should bear equally any deficiency on the payment of those debts and expenses, and the encumbrance on his homestead, after applying his personal estate and the proceeds of the land which he ordered sold. He made his three sons his executors. It will be seen that by the will of 1870, he gave all his property, except the land which he ordered to be sold, to his three sons, subject to legacies amounting, in the aggregate, to \$2,000, to his daughters, Mrs. Twitchell, Mrs. Collins, Mrs. Herbert and Mrs. Day; and by the will of 1872, he gave the same property to his two surviving sons, subject to legacies to the same daughters and the children of one of his deceased sons, amounting, in the aggregate, to \$1,800. Both wills exhibit the same plan of disposing of his property, and demonstrate his intention to leave his land to his sons, subject to such legacies as he might see fit to give to his daughters and such of his grandchildren, if any, as he might designate. And it appears that part of his design was to keep the land in the family. Dr. Laird testifies that while George was alive, the testator told the witness that he wanted to divide his property among his three boys, and he got a surveyor and ran it out; and he says that after the survey was made, the testator talked to him about the monuments &c., and that he told him about the lines, which way they went and where they came out. Nor is there evidence of any declaration of the testator made, at any time, of any intention or disposition to make any distribution, either more favorable to his daughters and the children of his deceased children, or less favorable to his sons, than is made by his testamentary acts. It is quite possible that he did not fully realize the value which the farm had acquired by reason of the railroad facilities, which have made the part of it bordering on the river desirable as sites for summer residences; but that fact, if admitted, does not, by any means, demonstrate his want of testamentary capacity, and is not sufficient ground on which to set aside his will. If the land ordered sold had a speculative value sufficient to remove all apprehension

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of necessity to sell the rest, it would, at most, show that his apprehension that his sons would not be able to pay the encumbrances without selling the land devised to them, was unfounded. There is also evidence that he had other reasons for giving the greater part of his property to his two sons, and comparatively little of it to his daughters and grandchildren. Ann Jones, who was housekeeper at the homestead, says that she has heard him say that Andrew had taken care of him since he was blind, and had been a good boy to him, and that Andrew should lose nothing by him; and that the girls had done nothing for him and cared nothing about him, and that he had done a great deal for them. But the testator's testamentary capacity having been established, his will will not be set aside because of inequality in the disposition of his property. He had a right to make such distribution of his estate as he pleased. *Stat pro ratione voluntas*. If he had a sound and disposing mind, his dominion over his property and his right to make such disposition of it as suited his inclination, will be recognized. To hold the contrary, would be to substitute, to a certain extent at least, the will of the court for that of the testator.

"If we are clear," says Judge Potts (in the orphans court), in *Turner v. Cheesman*, 2 *McCurt.* 243, 257, "that this is the testator's codicil, and expresses the will of a sound and disposing mind, we cannot look beyond it for his reasons or his motives for doing what he did. The right of absolute dominion which every man has over his own property is sacred and inviolable. The argument is only legitimately applicable so far as it affects the question of the testator's capacity at the time."

"A testator," said the court, in *Boylan ads. Meeker*, 4 *Dutch.* 274, 277, "has the right to make an unreasonable, unjust, injudicious will, and his neighbors have no right, sitting as a jury, to alter the disposition of his property, simply because they think the testator did not do justice to his family connections."

"It may be harsh and severe," says the court in *Den v. Gibbons*, 2 *Zab.* 117, 153, "it may be extremely cruel, under some circumstances, to disinherit one child and to bestow the whole estate upon another, but if the testator be of disposing mind and memory, and duly execute such will in the form prescribed by law, no court can interfere."

In the case in hand, it is not difficult to supply motives for giving the greater part of the property to the two sons. They

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alone had attended to the testator's wants, and cared for him when he most needed care and attention. And it is quite probable that if it had not been that the homestead farm has recently acquired the speculative value before referred to, the inequality now urged against the will would not have challenged complaint.

In *Humphrey's will*, 11 C. E. Gr. 513, affirmed on appeal, *sub nom. Jenkins v. Moore*, 12 C. E. Gr. 567, it was said by this court :

"A discrimination made by a man of the testator's age [he was very old] and in his condition [he was blind] in disposing of his estate in favor of his only daughter, who had given to him her whole time, and with assiduous attention ministered to his wants when he most needed care and sympathy, can neither be regarded as evidence of incapacity or undue influence."

The decree of the orphans court admitting the instrument to probate, should be affirmed, with costs of the appeal and a counsel fee of \$100 to each side, to be paid out of the estate.

SARAH G. PARKER, appellant,

v.

JOSEPH COMBS'S administrators, respondents.

A creditor of a decedent who presents his claims at any time before the decree of the orphans court barring creditors is actually taken, is in time, although the nine months limited in the order may have expired.

Appeal from order of Monmouth orphans court refusing to admit to a dividend a claim against the estate of Joseph Combs, deceased, not put in within the time limited in the order limiting creditors.

Mr. W. H. Vredenburg, for appellant.

Mr. C. Robbins, for respondents.

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THE ORDINARY.

The order to limit was taken January 26th, 1876, and the time limited therein was nine months. The order barring creditors was not made, however, until January 2d, 1877. The appellant did not put in her claim under oath within the nine months, but exhibited it a few days after they expired, and before the order barring creditors was entered. The view which was taken by the supreme court in *Ryder v. Wilson's Exr.*, 12 Vr. 9, as to the construction of the sixty-second section of the orphans court act (*Rev. 764*), which provides that the creditors failing to exhibit their debts shall, by *the decree barring them*, be barred, is conclusive of the controversy between the parties to this litigation. It was there held that the creditor is not barred until the decree barring him is made. See, also, *Terhune v. White*, 7 Stew. Eq. 98. The order of the orphans court appealed from is based on the construction that the creditor is barred if he fails to come in within the limited time, even though he does come in before the order barring creditors is made. It should be reversed, with costs.

JOSEPH S. MOUNT, administrator, appellant,

v.

GEORGE VAN NESS, respondent.

By statute, certain appeals from orders of the orphans court must be demanded within three months. On June 18th, 1880, an order was signed, and on the same day marked filed by the surrogate, who did not know its contents. It remained in the surrogate's office until July 17th, 1880, when it was inadvertently sent up to the prerogative court with the papers in another appeal between the same parties, on a decree rendered in the settlement of the same estate. It remained there until discovered on February 10th, 1881, when it was taken back to the surrogate's office, and, by order of the orphans court, on February 18th, 1881, marked refiled. The evidence showed that the surrogate had been frequently applied to, in the meanwhile, by the proctor of the

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appellants, and, in ignorance or forgetfulness of the order, had informed him that no order in the case had been made. Careful search for the order was also made in the surrogate's office, by the surrogate and the proctor.—*Held*, that the orphans court had no power to direct the order to be refiled, so as to extend the time for appealing, but, nevertheless, that the appellant could not, by the mistake of the surrogate, be deprived of his right of appeal

Appeal from the order of Mercer orphans court. Motion to dismiss.

Mr. J. Wilson, for the motion.

Mr. A. G. Richey and *Mr. G. D. W. Vroom*, *contra*.

THE ORDINARY.

The respondent moves to dismiss this appeal, on the ground that it was not taken within the time limited by the statute. The order appealed from was one charging the appellant with interest on the amount of a payment disallowed and stricken out of his account by the court. It was made June 18th, 1880, but the appeal was not taken until March 30th, 1881. The statute provides that the appeal, in such case, shall be demanded within three months from the making of the order, "unless otherwise specially provided." The order in question was made after full discussion by counsel and deliberate consideration on the part of the court. The argument was heard in May, 1880, and the opinion of the court was not filed until the 1st of June following. None of the proctors or counsel on either side was present when it was handed to the clerk (the surrogate) to be filed. Subsequently, the proctor of the respondents, meeting one of the judges in the street, was informed by him that it had been filed. The proctor of the respondents soon afterwards prepared the order, and, at a regular term of the court, held June 18th, 1880, presented it for signature, and it was signed accordingly; and he handed it at once to the surrogate, or his clerk, to be filed. It appears that the surrogate's clerk wrote on it, "Filed, June 18th, 1880," and the surrogate signed this

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certificate, "Scudder, surrogate," but at what time the certificate was made or signed, does not appear.

The order seems to have remained in the surrogate's office until July 17th, 1880, when it was inadvertently sent by the surrogate to the office of the register of the prerogative court, with the proceedings in reference to a former decree, made in the settlement of the same estate, from which an appeal had been taken. It remained there until February 11th, 1881. On the 10th of February, 1881, the proctor of the respondent, being in the office of the proctor of the appellant, the latter spoke of the order, saying that he had inquired of the surrogate for it, and that the surrogate had told him it had not been filed. The proctor of the respondent assured him that the surrogate was mistaken, and told him that he had drawn the order and caused it to be filed. The next day the proctor of the respondent went to the surrogate's office, and asked the surrogate for the order. The latter replied that it was not on file, and that he had no recollection of having ever seen it. The surrogate, on being assured by the proctor of the respondent that it had been filed, made search for it, but could not find it. He then suggested that it might have been sent to the register's office with the before-mentioned proceedings in reference to the decree. Subsequently it was found among those proceedings. The orphans court, on the matter being brought to its notice by the proctor for the appellant, directed that the order be refiled, and it was accordingly marked "Refiled, February 18th, 1881, by order of the orphans court." The appeal, as before stated, was taken on March 30th, 1881.

The respondent's counsel insists that, inasmuch as the appeal was not demanded within three months from the time when the order was filed, the right of appeal is lost; that the orphans court could not extend the time for appealing, and could not revive the right by directing that the order be refiled; and that the appeal, not having been demanded within the time limited by the statute, the respondent, *ipso facto*, acquired a vested right to hold the order as established, and without liability to be required to defend it on appeal.

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It is undoubtedly true that it is not in the power of the orphans court to extend the time fixed by statute for demanding an appeal from its order or decree. The constitution (*Art. VI. § 4*) provides that all persons aggrieved by the order, sentence or decree of the orphans court, may appeal therefrom, or from any part thereof, to the prerogative court, and the legislature (*Rev. 791 § 176*) has made like provision, with a limitation as to the time within which the right is to be exercised, providing that the appeal is to be demanded within thirty days after the order or decree, if the appeal is from an order or decree respecting the probate of a will, or right of administration, or the fairness of an inventory, and within three months after the making of the order or decree in any other case, unless otherwise specially provided: that is, otherwise provided by statute. The right of appeal is, by the act, made conditional upon the appeal being demanded within the time fixed by the statute; and the time is to be computed from the time when the order or decree appealed from was reduced to writing and filed, or entered in the minutes of the court. *Hillyer v. Schenck*, 2 *McCart*. 398. It has been repeatedly decided elsewhere that, where a party has failed to comply with the statutory provision as to the time for appeal, his right of appeal cannot be revived by re-entering the decree in order to enable him to appeal. *Townsend v. Townsend*, 2 *Paige* 413; *Barclay v. Brown*, 7 *Paige* 245; *Caldwell v. Mayor &c. of Albany*, 9 *Paige* 572; *Bank of Monroe v. Widner*, 11 *Paige* 529; *Weed v. Lyon*, *Walk. Ch.* 77: In the case in hand, the orphans court could not, had the failure to appeal within the time fixed by law been due to the negligence or mistake of the appellant, have given him further time to appeal by directing that the order be refiled for that purpose. But the proofs show that, although the order was filed on the 18th of June, 1880, the surrogate replied to the repeated inquiries made of him by both proctor and counsel during the summer of that year, with a statement that it had not yet been made. And he was sincere in this; for, though he signed the certificate of filing endorsed on it, he appears to have done so without knowing what the paper was, and he had no knowledge that the order had been

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made. From the 17th of July, 1880, to February, 1881, the order was not in the surrogate's office at all, but was in the office of the register of the prerogative court, where it had been sent by the surrogate by mistake. So that, for about two months of the three given for appeal, not only was the existence of the order denied by the official custodian thereof, but it was not in his office; and therefore, though one of the appellant's counsel personally made search for the order in that office during that period, he could not find it. Nor does there appear to have been any record of it. Whether the respondent has acquired the vested right which he claims, to hold the order as established, and clear of liability to reversal on appeal, must, of course, depend on whether the appellant lost his right of appeal, under the circumstances, with the lapse of the period of three months. The action of his adversary, or of the court or its clerk, may be such, in concealing the existence of the order or decree from the party aggrieved, as to save his right of appeal, notwithstanding the expiration of the time for appealing fixed in the statute.

In *Hillyer v. Schenck*, the court said, (Green, ordinary):

"If the court had met and made the decree privily or without full notice to the appellant, clearly his right of appeal would not have been lost. Much more, if the fact of the decree had been intentionally concealed from the proctor of the party aggrieved, or its existence denied or any artifice or fraudulent practice resorted to to deprive him of the opportunity of appeal, the right of appeal would not have been lost. But there was no allegation of fraud or unfair practice. The court met by formal appointment to decide the cause; the decision was made in the hearing of both proctors; an adjournment was immediately and publicly made in the presence of the proctor of the aggrieved party to an early day, that the decree might be formally prepared for signature. On the day thus designated, the court met, the decree was signed and immediately placed on file, where it thereafter remained until the time for appealing had expired."

Said Chancellor Walworth in *Barclay v. Brown*, before cited:

"The appellant's solicitor was not misled or prejudiced in this case by the mistake in the caption of the decree, as he knew it was antedated as of the time of the hearing before the vice-chancellor. Neither was he prejudiced by anything which occurred in the clerk's office, as he did not examine the

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books for the purpose of ascertaining when the decree was actually entered. If he had done so, and had been misled by any neglect or mistake of the clerk, it might be a sufficient ground for an application to the vice-chancellor to have the decree re-entered with a corrected caption; so as to give his clients an opportunity to appeal from the decree within the time allowed by law after a re-entry thereof."

In the case under consideration, the fact that the order had been made was concealed from the party aggrieved by the denials of the clerk of the court, the official custodian thereof, that it had ever been made, and, as before stated, for about two months of the statutory time for appealing, the order was not in the surrogate's office, but in the office of the register of the prerogative court, where it had been sent by the surrogate by mistake. In *Young v. Young*, 5 *Stew. Eq.* 275, a decree of the orphans court disallowing a claim against an insolvent estate was made (but not on a regular court day) and marked filed by a person who had been, but was not then, surrogate, and who signed the certificate of filing with his own name as late surrogate. The surrogate was not aware of its existence until, fifteen days afterwards, the proctor of the appellant inquired for it and it was then found. The surrogate then or afterwards signed the before-mentioned certificate of filing. The statute provided that the appeal must be taken within twenty days from the time of rendering the decree. It was held that though the decree was actually rendered on the 2d of December, and signed and marked as filed on that day by both the late surrogate and the surrogate, yet that in fact it must, under the circumstances, be held, in view of the appellant's right of appeal, not to have been rendered until the 17th, when it was first marked as filed by the proper officer. Obviously it makes no difference whether the action of the adverse party or of the court or its clerk, which prevents the party aggrieved from appealing, is the result of fraudulent design or honest mistake. The consequence is the same. The appeal in the present case was, indeed, not demanded within three months from the time when the order was filed, but notwithstanding due diligence on their part, the proctor and counsel of the appellant could not, during that time, ascertain

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that it had been filed. Its existence was denied by the officer in whose custody it would be found if it existed. And it was not until February 11th, 1881, that its existence was admitted by that officer. Under the circumstances, the appeal will be held to have been demanded within the time allowed by law. The motion, therefore, will be denied, but without costs.

CASES ADJUDGED
IN THE
COURT OF ERRORS AND APPEALS
OF THE
STATE OF NEW JERSEY,
ON APPEAL FROM THE COURT OF CHANCERY.

NOVEMBER TERM, 1881.

AGNES M. MILLER et al., appellants,

v.

JOHN M. FERDON, respondent.

On appeal from a decree of the chancellor, whose opinion is reported in *Ferdon v. Miller*, 7 *Stew. Eq.* 10.

Messrs. Linn & Babbitt, for appellants.

Mr. C. H. Voorhis, for respondent.

The opinion of the court was delivered by

BEASLEY, C. J.

I agree with the views as to the merits of this case expressed in the opinion of the chancellor, and think that the decree, to that extent, should be affirmed, and the mortgage in question should be held valid.

But the decree, as it would seem, from inadvertence, goes beyond the relief indicated in the opinion, in the respect of im-

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posing on Mrs. Miller and her general estate the deficiency that may arise on the sale of the mortgaged premises. Mrs. Miller was the surety of her husband in that transaction, and she could not, therefore, assume any personal obligation. The decree in that particular must be set aside and modified. As the appellants, if they had called the attention of the chancellor to this excess in this decree, could have had it properly restricted, and as they omitted to do so, they are not entitled to costs in that court.

ADAH A. PUTNAM, appellant,

v.

LYDIA A. CLARK et al., respondents.

1. A complainant, being excluded as a witness in the proceeding in equity, because one of the adverse parties stands before the court in a representative capacity, cannot retry the same issue in a court of law, after an adverse decree in the chancery suit.
2. The fact that she can be a witness in the second suit, and could not in the first, will not give such right.
3. The doctrine of *res judicata* discussed.

On appeal from a decree based on the following opinion of Vice-Chancellor Van Fleet :

The question to be decided is raised by a plea to the bill of complaint. The argument was, in effect, a demurrer to the plea, the discussion turning solely on the question whether the facts stated in the plea, if true, were a sufficient ground for dissolving the injunction, to which, taking the bill of complaint by itself, it was not denied that the complainants were entitled.

The bill was filed to restrain the prosecution of an action of detinue in the supreme court of this state, brought by Adah A.

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Putnam against Lydia A. Clark, for the possession of a bond and mortgage dated June 21st, 1869, for \$12,000, made to the said Adah by Jane and John M. Mackay, and which are alleged, by means of several subsequent assignments, to have become the property of Lydia A. Clark. The claim of Mrs. Putnam to the possession of the same bond and mortgage, has been recently litigated in this court, and adjudged against her. The action of detinue begun since the litigation here was finally decided, is sought to be restrained by the defendants in the former suit, on the ground that the asserted claim is *res adjudicata*. The defendants in that suit invoke the principle of the maxim, *nemo debet bis vexari pro una et eadem causa*. This principle seems to me to be clearly applicable to the present controversy, and I must therefore advise that the injunction be retained.

The bond and mortgage were, on or about the 1st of April, 1871, delivered by Mrs. Putnam to William C. Barrett, a counselor-at-law in New York, with a deed of assignment therefor, duly executed and acknowledged, which deed of assignment was subsequently found by Mrs. Putnam to have been recorded with the name of William C. Barrett as grantee therein, instead of the name of William Ramsay, to whom she says it was, in fact, originally drawn, to whom it was meant by her to go, and from whom she was to receive, through Barrett, her attorney, the full consideration therefor. Barrett having afterwards absconded while she supposed the papers so assigned were still in his hands, undelivered, she became apprised of the assignment being on record, and of the subsequent transfer, through several intermediate purchasers, of the bond and mortgage to Lydia A. Clark, one of the complainants in this suit, and one of the defendants in the former one. Mrs. Putnam alleges that Barrett fraudulently erased the name of Ramsay from the assignment, and inserted his own; that he deceived her by falsehoods, and that, notwithstanding the payment of full value, without notice on the part of Mrs. Clark, she never parted with her title to the securities, and ought now to recover them from Mrs. Clark, to whose possession they have come.

The bill of complaint exhibited by Mrs. Clark sets out the

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proceedings in the former litigation in this court for the recovery of the securities, and shows that the action of detinue is for the same securities on the same asserted title, and between the same parties. It was not disputed on the argument that, taking the bill by itself, the injunction which is prayed for should issue, but the contention very ingeniously and urgently made by the counsel of Mrs. Putnam was, that the facts set out in the plea exempted her case from the operation of the principle of the maxim quoted above. The plea, in substance, avers that, in the former suit, she did not testify as a witness, not being legally competent; that, if she had been admissible and sworn, she could and would have proved by her testimony, that the name of Barrett, in said deed of assignment, was fraudulently inserted, and that she never, in fact or in law, transferred to any one the title to the securities in dispute; that the bill which she filed in the former suit was by herself and her husband against Mrs. Clark alone; that, before any evidence was taken therein, the executors of Hosea F. Clark, deceased (of whom Mrs. Clark was one), were, on their own application, made parties defendant; that, by such addition of parties, she, Mrs. Putnam, was excluded as a witness, and was, consequently, unable to establish by proofs her right to the possession of the securities, as she will be able to establish it by her own oath, if permitted to proceed with her action at law.

The inquiry is, does this circumstance entitle her, after a full hearing in this court, with an adverse result, to open the controversy anew in another tribunal—the property sought to be recovered, the grounds of her claim to it, and the parties from whom recovery is sought being the same? I am unable to answer this inquiry otherwise than in the negative. The case undoubtedly involves a great hardship for Mrs. Putnam, as it stands, but, an opposite result would involve a great hardship for Mrs. Clark. There is no suggestion that, in the former suit in this court (which was carried also to the court of appeals and there adjudged as below), there was any ingredient of surprise or unfairness, or that there has since been discovered any evidence then unknown.

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The doctrine of *res adjudicata* rests on strong reasons of public policy, and also of private right. If, after decree in equity, a party shall proceed at law for the same matter, equity will restrain him by injunction. Such suit at law is treated as contempt of court, for it is gross oppression to vex another with a double suit for the same cause of action. 2 *Lead. Cas. in Eq.* 1319 [635]; *Story's Eq. Jur.* 889; *Joyce on Inj.* 1040; *Simson v. Hart*, 1 *Johns. Ch.* 91(a); *Washington Packet Co. v. Sickles*, 24 *How.* 333, 5 *Wall.* 580.

Mr. Charles H. Hartshorne, for appellant.

The case shows :

First. That in a previous suit in chancery, Mrs. Putnam, as complainant, and Mrs. Clark and the executors, as defendants, contested the question : Was the assignment from Mrs. Putnam to Barret fraudulently altered ? Of which question, Mrs. Putnam maintained the affirmative.

Second. That in that suit, the court adjudged that Mrs. Putnam failed to prove the affirmative of that issue, and on that ground decreed against her, dismissing her bill.

Third. That subsequently Mrs. Putnam brought an action in the supreme court against Mrs. Clark alone, in which she proposes to try the same issue as that presented in the former suit ; that Mrs. Clark and the executors now apply to the court of chancery for an injunction against the prosecution of the suit at law, alleging that the question was tried in the first suit, and that the decree in that suit is a bar to the suit at law—to which bill Mrs. Putnam pleads that in the first suit the court had no power to, and did not, receive her own testimony ; that by her testimony she can prove that the assignment was fraudulently altered,

(a) NOTE.—*Simson v. Hart* was reversed in *Simson v. Hart*, 14 *Johns.* 63. But see, *Gordon v. Lewis*, 2 *Sumn.* 628, 634; *Barnum v. Reynolds*, 38 *Cal.* 643, 647, which criticise the reversal; and see further, *Ross v. Wood*, 70 *N. Y.* 8; *Riggs v. Pursell*, 74 *N. Y.* 370; *Carpenter v. Providence Ins. Co.*, 4 *How. (U. S.)* 185, 223; *Railroad Co. v. Neal*, 1 *Woods* 353, 355.

The case does not appear to have been referred to in *Wells's Res Adjudicata*. —REP.

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and that in the action at law the court has power to, and will, hear that testimony.

The order below overruled this plea. The appeal is from that order.

It is also necessary, *in limine*, to answer two objections from the other side.

First. The objection that the court will not try a case on new evidence, where the evidence might have been procured by due diligence in the first suit. But the case at bar is distinguished from all cases to which this objection applies, by this feature, viz., the evidence of Mrs. Putnam was omitted in the first suit, not because of any neglect of hers to present it, but because of the want of power in the court to receive it. This feature may or may not be sufficient to prevent the supposed estoppel. It certainly presents considerations entirely different from those suggested in the objection, and renders the latter irrelevant.

Second. The objection that Mrs. Putnam, having had the choice of two remedies, *i. e.*, an action in detinue, or her suit in equity, and having *elected* to pursue the latter, is barred by that *election* from afterward suing in detinue or in any other form. *Countess of Plymouth v. Bladon*, 2 Vern. 32; 1 Dan. Ch. Pr. (ed. 1871) 817; *Story's Eq. Pl.* § 742; *Hughes v. Nelson*, 2 Stew. Eq. 548; *Blanchard v. Pasteur*, 2 Hayw. (N. C.) 590.

I. When the court, in the first suit, had not power to receive material evidence, which evidence, if admitted, might have led to a different result, and which evidence is admissible on the second suit, the judgment in the first suit is not a bar to the second. *Duchess of Kingston's Case*, 2 Smith's Lead. Cas.; 1 Whart. Ev. § 777; *Riker v. Hooper*, 35 Vt. 457; *Sopwith v. Sopwith*, 2 Sw. & Tr. 169; *Stoate v. Stoate*, 2 Sw. & Tr. 223; *Bancroft v. Bancroft*, 3 Sw. & Tr. 597; *Rex v. Boston*, 4 East 572; *Norton v. Wood*, 5 Paige 249; *Jordan v. Loftin*, 13 Ala. 547; *Miller v. McCan*, 7 Paige 451; *Lewis v. Davis*, 8 Daly 185; 1 Greenl. Ev. 523; *Magauran v. Paterson*, 6 S. & R. 278; *Munday v. Vail*, 5 Vr. 418; 1 Whart. Ev. §§ 758, 784, 785, 788; *Cromwell v. Sac*, 94 U. S. 351; 1 Greenl. Ev. 546 d; 1 Whart. Ev. 802.

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II. That Mrs. Clark was a *bona fide* purchaser of the bond and mortgage for value, does not aid her case.

For this defence to be held, the person from whom the purchase was made must have had an equitable or legal title, or must have been carelessly armed with the evidence of title. A forgery can pass no rights, even to a *bona fide* purchaser. *Story's Eq. Jur.* §§ 1502-1505, 1510; 1 *Dan. on Neg. Inst.* 634; 2 *White & T. Lead. Cas.* 32, 45, 46, 61; *Ruckman v. Decker*, 8 *C. E. Gr.* 282.

Mr. Gilbert Collins, for respondents.

I. The bill makes a proper case for an injunction.

The complainant's bill in this suit prays an injunction to restrain any suit at law to recover possession of said bond and mortgage. The propriety of filing this bill instead of pleading the former adjudication in the suit of detinue, is not now the question before the court. The present controversy is as to the validity of the plea. Still it may throw some light upon the case if we show the grounds on which the interference of the court is claimed.

(a) The first ground is that complete justice cannot be done in the action at law, for want of parties. *Story's Eq. Jur.* §§ 885, 901; *Radcliffe v. Varner*, 56 *Ga.* 222.

(b) The second ground on which we place the bill is that taken by the vice-chancellor, in his opinion, namely, that after a decree in chancery on the merits, a suit at law for the same relief is vexatious and a contempt of court, and will be enjoined as such. The authorities in support of this proposition are numerous. *Eden on Inj.* 57, 58, 59; *Story's Eq. Jur.* § 889; *Joyce on Inj.* 1040; 2 *Lead. Cas. in Eq.* 1320; *Mocher v. Reed*, 1 *B. & B.* 319; *McNamara v. Arthur*, 2 *B. & B.* 349; *Selby v. Selby*, *Dick.* 678; *Grand Junction Canal v. Dimes*, 17 *Sim.* 38; *Frank v. Basnett*, 2 *Myl. & K.* 619; *Phelps v. Prothero*, 7 *De G. M. & G.* 722. See, also, *Wilson v. Wetherherd*, 2 *Meriv.* 406; *Bell v. O'Reilly*, 2 *Sch. & Lef.* 430; *Paxton v. Douglass*, 8 *Ves.* 520; *Thompson v. Brown*, 4 *Johns. Ch.* 619;

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Morely v. Bassett, 1 Ves. & B. 383; *Rogers v. Vosburgh*, 4 Johns. Ch. 84; *Wedderburn v. Wedderburn*, 2 Beav. 209; *Hope v. Curneigie*, L. R. (1 Ch. App.) 320; *Turner v. Turner*, 19 L. J. (N. S.) Ch. 352, cited in *Joyce on Inj.* 1263.

II. The matter litigated in the action at law is *res adjudicata*.

There is no question that the relief sought and the issue raised in the action of detinue are identical with the relief sought and issued raised in the former chancery suit. Neither can there be a doubt that the chancellor had jurisdiction to award the relief prayed in the former suit, namely, the delivery to complainants in that suit of the bond and mortgage. *Duke of Somerset v. Cookson*, 1 Lead. Cas. in Eq. 1110 [821]; *Jackson v. Butler*, 2 Atk. 306.

All dismissals after hearing are presumed to be on the merits, unless the decree expressly provides that they shall be without prejudice. *Durant v. Essex Co.*, 7 Wall. 107; *Asbury v. Lafarge*, 2 N. Y. 113; *Bigelow v. Windsor*, 1 Gray 299.

(a) *Nemo debet bis vexari pro una et eadem causa*. *Broom's Max.* 327, 329; *Wells's Res Adjudicata* 253, 296, 308; *Simson v. Hart*, 1 Johns. Ch. 91; *Aurora v. West*, 7 Wall. 102; *Beloit v. Morgan*, 7 Id. 622; *Henderson v. Henderson*, 3 Hare 115; *Ricardo v. Garcias*, 12 Cl. & Fin. 400; *Cromwell v. County of Sac*, 4 Otto 353; 2 *Smith's Lead. Cas.* 771; *Hopkins v. Lee*, 6 Whart. 113, quoted in *Wells's Res Adjudicata* 336.

(b) The respondent, by her plea, does not dispute that the question in the action of detinue is the same question which was decided by the chancellor, that the chancellor had jurisdiction, and that his decree was upon the merits. Her plea is that in the chancery suit the law excluded her from being a witness, because the executors of Hosea F. Clark were admitted as defendants to that suit, that she was prejudiced by that exclusion, and could probably have sworn her own case through, and that therefore she can try the cause over again in a form of action where she can be a witness for herself. *Stark. (9th ed.)* 328 [358].

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(c) The defendant, before the vice-chancellor, cited cases of new trials at equity after judgment at law. These may all be met by the suggestion that they were based on equitable grounds. *Stoate v. Stoate*, 2 Sw. & Tr. 223.

The opinion of the court was delivered by

BEASLEY, C. J.

The purpose of this suit in chancery was to restrain a suit at law brought by Adah A. Putnam, the appellant, against the respondent, Lydia A. Clark. The equity in the bill consists in the fact that the matter attempted to be drawn in question in the legal action had been decided previously, in the court of chancery, in a controversy between these same parties. The question involved in both of these proceedings is whether an assignment of a certain mortgage was made, in the form in which it exists, by the appellant and her husband, or had been shaped into its present form by a forgery. In the proceeding in equity, the appellant could not be a witness, in consequence of one of the adverse litigants being a party to the suit in a representative capacity, her contest before that tribunal being supported by the testimony of her husband, and, as was insisted, by certain circumstances which were exhibited in the evidence. On the issue and proofs thus made, a decree passed against her, and the assignment was validated. The suit at law was then instituted by the appellant in the form of trover, for the mortgage so assigned, and which suit was founded on the ground that the assignment thus established by the decree was invalid, in consequence of the alteration before mentioned. The bill embraced in the decree appealed from was exhibited to restrain this suit. In reply to this bill, the appellant, by way of plea, in substance alleged the single fact that, in the equitable suit, she was prevented, by the rules of law, from being a witness in her own favor, and that she is not thus disqualified in the action at law, her contention being that, as the same issue is triable on different rules of evidence, the doctrine of estoppel resting on the ground of *res adjudicata* is not applicable.

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But this position is unsupported, so far as I have perceived, by either *dictum* or precedent, and is inconsistent with legal rules resting on the solid basis of public policy and good sense. The proposition for which the appellant contends is this, that a party, as the actor in the suit, may voluntarily submit his contest for decision to a tribunal in a state of the evidence which is exclusive of his own oath, and, such decision being adverse, may retry the same issue, on the ground that he is desirous of introducing his own testimony. If this be so, then, in this class of cases, such actors have it in their power, in every instance, to vex their adversaries by two trials, instead of, as in common cases, being stinted to one. It will be observed that, in this instance, the appellant had it in her power to choose, in the first instance, the legal forum in which her action is now pending, so that her own oath would have availed; but she selected the equitable forum, and, having failed, now claims the right of having her case heard in its turn by the former. This claim is plainly opposed to the doctrine that imparts to the *res judicata* its state of being conclusive. That doctrine grows out of the inconvenience and injustice of the repetition of litigations between the same parties on the same issues.

"After a recovery by process of law," says Lord Kenyon (*Marriott v. Hampton*, 7 T. R. 269), "there must be an end of litigation; if it were otherwise, there would be no security for any person."

And, indeed, so essential is the principle that it does not seem peculiar to any particular system of laws; it existed in the Roman law, and probably can be found, in some form, in that of every civilized people. The rule is not to be disputed, nor can it be safely infringed.

In his argument before the court, the counsel of the appellant rested his contention on the circumstance that the decree in question was founded on a lesser amount of evidence than the judgment, if it should be obtained in the court of law, would be; but this reasoning indicates the misapprehension of a legal rule. The legal rule referred to is that which declares that when the law requires a certain measure of evidence to warrant a

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judgment in a certain class of cases, a judgment founded on a lesser measure cannot be conclusive on the trial of any case of such class. The decision in *Riker v. Hooper*, 35 Vl. 457, cited in the argument, is an illustration in point. The facts were that Riker had impounded Hooper's horse; Hooper sued in trover, and the issue was as to the legality of the proceedings to impound. Such proceedings were found to be legal, and judgment was given for Riker. Subsequently, Riker sued Hooper on a penal statute to recover a certain sum per day for the time he had impounded the horse, in which action, to prove that the proceedings to impound were legal, he offered the former judgment in evidence. But such evidence was held to be inadmissible, as it was a judgment in a civil suit which could have been based on a mere preponderance of evidence, while the penal action required evidence of greater weight, to wit, proof beyond a reasonable doubt. The *ratio decidendi* was this: that when the law demands a fixed standard of evidence, a smaller degree of evidence, although embodied in a judgment, will not avail. But such a principle is entirely aside from the present case, for the law does not establish one foundation of evidence in these chancery proceedings, and another for those at law. To make the case now pending analogous to the reported decision, the decree should have been rendered in evidence which, according to legal rules, would not be sufficient to produce a judgment in the suit at law; while, to the contrary of this, the decree and the judgment may rest on the same evidential basis.

So the inapplicability of the legal theory of the case of *Norton v. Woods*, 5 Paige 249, is apparent upon even a slight consideration. It was a bill to set aside a judgment at law which had been obtained because the defendant in that forum had not been permitted, by force of legal rules, to examine one of the plaintiffs as a witness. Here we find nothing but the ordinary principle that when a person is sued in a court of law having a defence which it is not in his power to present, accorded the right to seek relief in equity. But, even in such an instance, he must appeal to chancery at the first opportunity, for the chancellor in the case cited truly says, alluding to the proceedings at law, "it will be

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too late, after he has suffered judgment there, to apply to this court for relief." In the present case, the appellant not only suffered the decree in chancery to pass against her, but was the complainant in the cause, and put herself upon the judgment of the court. Neither this authority nor that of *Jordan v. Loftin*, 13 Ala. 547, which is in a similar vein, lends the least countenance to the contention raised in favor of the appellant.

Nor do I perceive the pertinency of the decisions cited from the court for divorce. The first of these was *Stoate v. Stoate*, 2 Sw. & Tr. 223, which merely maintained that when a judgment has been obtained on evidence that would not be admitted on the trial of the same issue in another form, the former judgment is inadmissible on the second trial, the ground being that it would be indirectly making use of evidence which was directly inadmissible in the latter trial. The other case, of *Sopwith v. Sopwith*, 2 Sw. & Tr. 160, is the application of the same principle under variant circumstances. It is not apparent how it can be reasonably contended that such adjudications can apply to a case where the evidence in the first suit is entirely admissible in the second suit on the identical issue.

With respect to the decisions to which the attention of the court has been called relative to the doctrine that a party is not concluded by the election of a forum in which to bring his suit, it is sufficient to say, that the existence of such doctrine is not denied, and that it is not the fact that the appellant in the first instance sought relief in the court of chancery that debars her from her action at law, but the circumstance having that preventive consequence is that, with knowledge that she could add to the force of her case her own testimony in a court of law, she elected to take the judgment of the chancellor on the issue, supported by evidence that did not prove to be sufficiently convincing. The vice-chancellor has stated, with great clearness, the legal rule applicable to this case, and the decree should be affirmed, with costs.

Decree unanimously affirmed.

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DAVID JONES'S EXECUTORS, appellants,

v.

THE STATE BANKING COMPANY, respondents.

A trust deed empowered the trustee to mortgage the lands thereby conveyed to such persons as the *cestui que trust* might designate in writing. The *cestui que trust* afterwards became indebted to the respondents for moneys paid by them for his use, on his checks and notes. Thereupon he requested the trustee in writing to execute a mortgage to the respondents to secure the payment of the notes or other commercial paper then or thereafter made or endorsed by him, and discounted by the respondents, not exceeding \$10,000 in amount. Under a subsequent written request, the trustee gave another mortgage on the same premises to appellant's testator.—*Held*, that, as against the appellant's mortgage, the respondents could recover the full amount of the *cestui que trust's* notes paid by them, whether discounted by them or not, except one not duly protested, and also all of his checks so paid, not exceeding, in the aggregate, \$10,000.

On exceptions to report of Amzi Dodd, Esq., advisory-master, who rendered the following opinion :

The question raised by the exceptions in this case is, whether certain checks and promissory notes which were computed by the master as part of the indebtedness secured by the open mortgage, were properly allowed. The exceptant insists that they were not, because not within the terms of the mortgage. The controversy arises as follows :

By deed of April 20th, 1871, John J. Korb and wife conveyed to John Whitehead certain real estate in trust for the purposes therein mentioned, of which the following was one trust :

"That in case Peter Wilhelm should desire, and should express such desire in writing, signed by him in the presence of one or more witnesses, then that the said John Whitehead should make, execute and deliver to such person or persons as the said Peter Wilhelm should, by such writing, designate and appoint, a mortgage or mortgages of and upon the said land and premises, or such part or parts thereof as the said Peter Wilhelm should describe in said

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writing, and for such amount or amounts, and payable at such time or times, and in such manner as the said Peter Wilhelm should, by such writing, name, designate and appoint."

On the 3d of February, 1873, Peter Wilhelm had been for some time a dealer with the complainants, doing business in Newark. Their corporate name was the State Trust Company, since changed to the State Banking Company. He owed the bank, at the last-named date, \$2,849.59, being the difference between the credit and debtor sides of his account, which difference is spoken of in the testimony as the amount of his overdrafts. The precise particulars of the transactions between Wilhelm and the bank, of which this indebtedness was the result, do not appear in the evidence. Whether it arose from checks drawn by Wilhelm, or from notes discounted for him or paid for him, or from such causes combined, it is not disputed that the indebtedness then existed, and that the bank had paid it on checks or notes for Wilhelm's account. Mr. Wilhelm had been a member of the corporation from its organization to January 9th, 1873. The cashier having reported to the finance committee that his account was overdrawn; that in addition to this, the bank held a considerable amount of his paper, and it being known that he was financially embarrassed, he appeared before the committee, at their request, and agreed to secure the bank for his overdrafts and the notes in its possession, and for other advances the bank might thereafter make, by giving a mortgage on the premises in question. This was in January, 1873. At a subsequent meeting of the committee, he was present with Mr. Whitehead, his trustee and adviser, when a statement of his account was presented and arrangements made for the giving of the mortgage. The written request for it from Wilhelm, and the mortgage itself, were drawn by Mr. Whitehead, by whom the mortgage was executed and delivered to the bank. Both instruments are dated February 5th, 1873. Relying on the security thus taken, the bank forebore to press the existing indebtedness, and made other advances during two years or more, after which Wilhelm died. The mortgage is an open one, limited as security to \$10,000. The amount found by the

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master to be due on it, April 18th, 1879, the date of his report, is \$7,799.90.

The exceptions to the report are on the ground that the checks drawn by Wilhelm and paid by the bank are not commercial paper discounted for Wilhelm, and also that so many of the promissory notes as were not made or endorsed by Wilhelm and discounted by the bank, at his request, are not within the mortgage provisions. The checks, it is said, although paid, were not discounted. So also of notes made or endorsed by Wilhelm and paid by the bank. It is insisted that none of these checks or notes—constituting a large part of the indebtedness—were commercial paper discounted for Wilhelm by the complainants, and consequently should not have been allowed by the master. I am of opinion that the interpretation of the word *discount*, on which the exceptant relied, is an over-strict one, in view of the facts of this case, and that it cannot be adopted.

The phraseology of the written request to the trustee and of the mortgage which he executed, is copious and substantially the same in both. The former recites that

"Whereas, the State Trust Company have, for my benefit and accommodation and at my request, discounted for me certain promissory notes or other commercial paper made by me and endorsed by me; and whereas, I may obtain from the said the State Trust Company other advances and discounts of and upon other promissory notes or commercial paper, or may renew the said promissory notes or other commercial paper already made and endorsed or hereafter to be made and endorsed by me as aforesaid, or give others in lieu, renewal or exchange of the said notes or other commercial paper already made or endorsed and discounted for me by said company, or which may hereafter be made or endorsed by me and discounted by the said the State Trust Company for me, to an amount not exceeding in the aggregate the sum of \$10,000; and whereas, I am desirous of securing the said the State Trust Company for the payment of such promissory notes or other commercial paper; now, therefore, I, said Peter Wilhelm, do hereby express my desire by this writing, and I do hereby request you, the said John Whitehead, to make, execute and deliver to the said the State Trust Company a mortgage of and upon the whole of the said land and premises so conveyed to you as aforesaid by the said John J. Korb, and mentioned and described in that deed, to secure to the said the State Trust Company the payment of the said promissory notes or other commercial paper already made by me or endorsed by me and discounted for me by the said the State Trust Company, and the payment of

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any and all promissory note or notes or other commercial paper which may hereafter be made or endorsed by me to the said the State Trust Company, and discounted by that company for me, and of all or any promissory note or notes or other commercial paper which may be given in lieu, renewal or exchange of such promissory note or notes or other commercial paper already made or endorsed, or hereafter to be made or endorsed by me and discounted for me by said company, or of any part of said promissory note or notes or other commercial paper, or of any or either of them, according to the tenor and effect of said promissory note or notes or other commercial paper, to an amount not exceeding the sum of \$10,000 in the aggregate."

In pursuance of the foregoing request, the trustee gave the mortgage, whose terms need not be recited, as they are admitted to be, in substance and effect, what is called for in the request.

Mr. Whitehead subsequently gave a mortgage on the same premises to one David Jones, on whose behalf he appeared as counsel before the master, and opposed the allowance of the payments and advances.

It is not claimed that the bank can be charged with actual notice of the subsequent mortgage. Its own mortgage being for future advances and duly registered, is entitled to priority over subsequent encumbrances for advances prior to such notice. *Ward v. Cooke*, 2 C. E. Gr. 93.

The subsequent mortgagee had notice of the full amount which the bank might claim. He made no inquiry to ascertain how much was claimed to be due, and does not stand in the position of a person injured or deceived by any misrepresentation. He was not misled, deceived or injured by any ambiguity or imperfection in the terms of the mortgage, descriptive of the nature of the past or future indebtedness to be secured. As to him, it was entirely competent for the parties to the first mortgage to vary or depart from such descriptive terms. The total sum named in the mortgage was the material fact to be looked to by the holder of the subsequent lien. *Laurence v. Tucker*, 23 How. 14; *Lyle v. Ducomb*, 5 Binn. 585.

In the last-named case, six months after the making of the mortgage, and after a builder's lien had attached to the property, the mortgagor and mortgagee entered into an agreement that a description of notes not before embraced by the mortgage, and

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made by a different drawer from the drawers named in the mortgage, should be embraced therein. It was held that the parties had a right to make such agreement as between themselves, and that it was also good as to third parties who were intervening encumbrancers, if the amount of the mortgage encumbrance were not thereby increased beyond the amount which the mortgage was intended to secure.

The same principle was applied in *Ward v. Cooke*, 2 C. E. Gr. 93. By parol agreement and understanding between Ward and Cooke, the mortgage was held good against a subsequent mortgagee for advances made after the execution of the second mortgage, though such advances were different from the debt stated in the first mortgage.

In the present case, the debtor Wilhelm was not the legal owner of the mortgaged premises, nor the maker of the mortgage. The terms of the deed in trust to Mr. Whitehead do not fully appear. Mr. Whitehead testifies that the premises were conveyed to him in trust for Wilhelm and his children. This is all that appears of the terms of the trust, except the recitals in the written request already quoted above. The power to mortgage conferred upon Wilhelm by Korb, in the trust deed to Whitehead, is of the most ample and unqualified kind, making Wilhelm, in effect, the beneficial owner of the land. This being so, if the recovery by the bank under their mortgage of their debt, so indisputably due, depended upon the question whether the words of the mortgage descriptive of the indebtedness, past or future, to be secured by it, could be varied or enlarged by parol agreement in the present case, as in the cases to which reference has been made, I should be unwilling to decide that question in the negative. But, in my judgment, such recovery does not depend upon the question of what was understood or agreed between the parties outside of the express provisions of the mortgage. The stress put by the exceptant on the word "discount" is not warranted, I think, by the fair sense and import of the word as it was used and understood by the parties. According to the contention of the exceptant, if Wilhelm had presented to the bank a note made or endorsed by himself,

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payable ten days thereafter, and had received for it the full amount of the note instead of the amount, less the interest, for ten days, the note would not have been included within the security of the mortgage, but would have been included if such interest had been deducted. In the one case, it is said that the note would have been discounted, while in the other case, it would not. Unless this contention be one of substance and truth, the notes sought to be excluded are within the words of the mortgage. As to the checks, it is said that no discount was made. That they were commercial paper, and so within the letter of the mortgage, is clear. That they were paid in full, without deduction or discount, would not exclude checks any more than the same reason would exclude notes. In my judgment, for the plain purposes for which the mortgage was made, and in the plain sense in which the language must be taken to have been employed, neither notes nor checks made or endorsed by Wilhelm and paid by the bank, or for him at his request, expressed or implied, can be withdrawn from the security to which the bank looked, and on which it must have been supposed to rely.

Nineteen checks were allowed by the master, all of them drawn by Wilhelm, directed to and paid by the bank. The promissory notes allowed by the master are seventeen in number, twelve of which are made by Wilhelm and five endorsed by him. One of the endorsed notes does not appear to have been duly protested, and the legal liability of the endorser is therefore open to dispute. For this reason, the amount allowed on that note must be deducted from the total sum found due by the master. It is admitted that the liability on the other endorsed notes was legally complete. The proceeds of the notes went to Wilhelm, and came first or last from the complainants, and were charged to his account in the usual course of business.

In respect to the note not properly protested, the exception taken should be allowed. The remaining exception should be overruled.

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Mr. J. Whitehead, for appellants.

I. The complainant is bound by the strict terms of the mortgage.

"When a mortgage is given for a specific purpose, it must be exclusively applied to that purpose; any other disposition of the security is a fraudulent misappropriation against which the mortgagor would be entitled to relief in equity." *Andrews v. Torrey*, 1 *McCart*. 355, 358; *Atwater v. Underhill*, 7 *C. E. Gr.* 599; 7 *C. E. Gr.* 16.

"A mortgage given to secure for materials in building a house does not cover a guaranty, nor liability as surety." *Doyle v. White*, 26 *Me.* 341; *Jones on Mort.* § 357, note 6; *Large v. Van Doren*, 1 *McCart*. 208; *Phillips v. Thompson*, 2 *Johns. Ch.* 423; *Vanatta v. Brewer*, 5 *Stew. Eq.* 268.

"If a mortgage is given to secure an ascertained debt, the amount of that debt ought to be stated." *Hart v. Chalker*, 14 *Conn.* 77; *Pearce v. Hall*, 12 *Bush* 209.

"When a mortgage describes the debts secured, to entitle a debt to the benefit of the security, it must come fairly within the terms used in the mortgage." *Turnbull v. Thomas*, 1 *Hughes* 172.

II. The terms of the mortgage cannot, in this case, be extended, nor amplified, nor changed by any agreement before or after its execution, by the original parties to it. Nor is parol evidence of the intention of the parties in the making of the mortgage admissible.

"There is no rule of evidence better settled than that which declares that parol evidence is inadmissible to contradict or substantially vary the legal import of a written agreement." *Stevens v. Cooper*, 1 *Johns. Ch.* 425; 2 *Wm. Black.* 1248; *Sugden on Vendors* [158], note c; *Renard v. Sampson*, 12 *N. Y.* 561; *Thorp v. Ross*, 4 *Abb. App. Dec.*, and note; *Botsford v. Barr*, 2 *Johns. Ch.* 415; *Martin v. Pyecroft*, 2 *De G. M. & G.* 785; *Sugden on Vendors* [161], note a; *Chetwood v. Brittan*, 1 *Gr. Ch.* 438.

"Evidence to show a mistake in a written instrument must

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be clear and strong, so as to establish the mistake to the entire satisfaction of the court." *Gillespie v. Moore*, 2 Johns. Ch. 585; *Lyman v. U. S. Ins. Co.*, 2 Johns. Ch. 630; *Jones on Mort.* § 96 p. 69, § 98 p. 71; *Farmers L. & Tr. Co. v. Comm. Bank of Racine*, 15 Wis. 424, 438; *Jaqui v. Johnson*, 11 C. E. Gr. 321.

If a mortgage secures a specified sum, the parties cannot, by parol agreement, as against others who have acquired rights in the property, extend the mortgage to cover other debts or further advances. *Stoddard v. Hart*, 23 N. Y. 556; *Townsend v. Emp. St. Dress Co.*, 6 Duer 208, and cases cited; *Large v. Van Doren*, 1 McCart. 208. See *Beekman F. Ins. Co. v. First M. E. Church*, 29 Barb. 658; 18 How. Pr. 431.

A mortgage to secure a gross sum which the mortgagee was at liberty to furnish in materials toward the erection of a house for the mortgagor, does not cover a collateral liability assumed by the mortgagee as surety or guarantor for the mortgagor. *Jones on Mort.* § 345; *Storms v. Storms*, 3 Bush 77; *Doyle v. White*, 26 Me. 341.

A mortgage conditioned to pay whatever sum the mortgagor might owe the mortgagee, either as maker or endorser of any notes or bills, bonds, checks, overdrafts, or securities of any kind given by him according to the conditions of any such writings obligatory, executed by him to the mortgagee as collateral security, was held to secure only such debts as were evidenced by writing. *Walker v. Paine*, 31 Barb. 213.

Where there is no ambiguity apparent, the fact that the parties have adopted and acted on an erroneous construction of the contract, will not preclude them from claiming their legal rights under a proper construction, as to subsequent transactions thereunder. *Stewart ads. L. V. R. R. Co.*, 8 Vr. 53.

III. The burden of proof, as to the amount due, is on the complainant. *Freytag v. Hoeland*, 8 C. E. Gr. 36; *Klein v. McGuckin*, 10 C. E. Gr. 433; *Jones on Mort.* § 346 p. 248; *De Mott v. Benson*, 4 Edw. Ch. 297.

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Mr. A. P. Condit, for respondents.

I. The mortgage to the respondents was executed for the purpose of securing them for *all* their advances to Wilhelm on his commercial paper, to the extent of \$10,000. All parties to the mortgage understood and intended that it should secure all advances—supposed it did secure them—and, throughout their dealings with reference to the mortgage and advances on it, *acted on this supposition*.

II. The benefit of the security by mortgage is not restricted to the special debt or debts described in the mortgage, but the parties may agree that the mortgage shall be a security for other or different debts, and what debts were intended to be so secured may be shown by parol. *Robinson v. Urquhart*, 1 *Beas.* 515; *Griffin v. N. J. Oil Co.*, 3 *Stock.* 49; 1 *Hill. on Mort.* 311; *Bank v. Finch*, 3 *Barb. Ch.* 293.

In this case, the evidence is clear that the mortgage was intended to secure all the advances by the bank to Wilhelm, to the extent of \$10,000; and, so long as the amount to be secured is not increased, a subsequent encumbrancer is not prejudiced by an agreement enlarging or changing the *character* of the debts to be secured. *Ward v. Cooke*, 2 *C. E. Gr.* 93; *Lawrence v. Tucker*, 23 *How.* 14; *Lyle v. Ducomb*, 5 *Binn.* 590.

Whitehead, who knew of the character of the debts intended to be secured by complainants' mortgage, was the counsel of Jones at the time of taking his mortgage, and Jones's mortgage is therefore held subject to the agreement of the parties as to the debts to be secured by complainants' mortgage. 1 *Hill. on Mort.* 319; *Stone v. Lane*, 10 *Allen* 74.

III. The debts excepted to by the appellant come fairly within the terms of the mortgage, in which the term "discount" is not used in its narrow sense as an advance upon which interest is deducted, but is used as equivalent to advances.

PER CURIAM. This decree unanimously affirmed, for the reasons given by the advisory master in the foregoing opinion.

Rafferty v. Todd.

PHILIP RAFFERTY's administrators &c., appellants,

v.

JOSEPH C. TODD, respondent.

A. B. Woodruff, for appellants.

I. The bill was filed March 28th, A. D. 1876. The last item in their pretended "secret business" was March 10th, 1869—more than seven years previous. The only item within the six years is a balance stated as of May 1st, 1872, but not proved. Every item of their pretended "secret business" was barred by the statute.

1. It was not an account between merchants, that is, between Todd & Rafferty as merchants.

2. All the items in it are on one side. It is not a mutual account. Here is an account demanded of a business begun in 1858, by a person having not even a claim of interest in it until 1859, carried on before his eyes, with his knowledge, until 1872, in July, and after the person carrying it on is dead and had been for nearly four years, the complainant files his bill for an account against his administrators.

Defences founded on lapse of time are regarded with favor by equity, "for the peace of society." 2 *Story's Eq. Jur.* § 1520, notes 2, 3, and § 1520 a.

If the plaintiff or complainant is within the exceptions in the statute, he must state that in his bill. *Story's Eq. Pl.* § 484. The complainant tried to do this by saying he did not know of it until after Rafferty's death. But this is proved to be false.

Courts of equity, in matters within the statute of limitations, are bound by the statute, as well as courts of law. 2 *Story's Eq. Jur.* § 1520 and note 2.

If "fraud" is proved, court removes the bar of the statute.

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For in cases of fraud, statute begins when the fraud is discovered. 2 *Story's Eq. Jur.* § 1521 a.

If it began to run in Rafferty's lifetime, it keeps on running. 2 *Story's Eq. Jur.* § 1521 a; *Freaker v. Cranefeldt*, 3 *Myl. & Cr.* 499; *Scott v. Jones*, 4 *Cl. & Fin.* 382; *Coward v. Perrine*, 6 *C. E. Gr.* 102.

To make the exception as to merchants' accounts, there must be "such connection" between the items as to constitute a running account. *Belles v. Belles*, 7 *Hal.* 339.

The statute runs over all subsequent disabilities, after it commences. 2 *Gr.* 288; 3 *Gr.* 347.

There must be items on both sides within six years to take case out of the statute. 2 *Gr.* 545; 3 *Harr.* 266. Although in cases of trust the court of chancery is not bound by statute of limitations, in other matters it is. 2 *Hal.* 357. *Barnes v. Taylor*, 12 *C. E. Gr.* 259, holds over twenty years, delay is fatal. In our case it is seventeen years after the business began.

In *McKnight v. Taylor*, 17 *Peters* 198, it was held nineteen years and three months barred.

Bowman v. Jeffersonville, 1 *How.* 189, holds twenty years is a bar "to stale demands."

The court only acts when moved by "conscience, good faith and reasonable diligence." *Kane v. Bloodgood*, 7 *Johns.* 90.

Six years bars in equity as at law. *Ang. on Lim.* 73; *Prince v. Haylin*, 1 *Atk.* 493.

Not barred if any one item is within six years, if "merchants' accounts" and "mutual" accounts. But there must be an item on the side of the defendant "giving credit." *Ang. on Lim.* 130, 131, 135; *Turnbull v. Steoecker*, 4 *McCord* 214.

II. As a person is only bound to account in cases where account would lie, how is complainant to maintain this bill for an accounting against his partner's administrators.

1. An action of account would not lie by the firm against Rafferty while living.

2. He kept no account with or for the firm, but the reverse—an account strictly between himself individually and his customers.

Rafferty v. Todd.

3. He so kept it adversely to the firm while living. The statute commenced in his lifetime, and had run over six years, as to every item in those accounts kept in this private book of his.

Court will analyze the account and see what is "mutual" and what is barred. *Belles v. Belles*, 7 Hal. 339; *Hibbs v. Johnston*, 3 Harr. 266.

The account was between Rafferty and California party, not with Todd or Todd & Rafferty. *Spring v. Gray*, 6 Peters 151.

Chancery is "bound" by the statute. *Marks v. Oliver's Exrs.*, 1 McCart. 259; *Dean v. Dean*, 1 Stock. 425; *Story's Eq. Jur.* 517.

If not mutual, all over six years is barred. *Coles v. Harris*, Bull. N. P. 149, 150; *Cranch v. Kirkman*, Peake's N. P. 121; *Catling v. Skouldring*, 6 T. R. 193; *Coster v. Murray*, 5 Johns. Ch. 522; *Gulick v. Princeton Turnpike*, 2 Gr. 545.

If account be closed over six years it is barred. *Franklin v. Camp*, Coxe 196; *Webber v. Twill*, 2 Saund. 124; *Martin v. Dillo*, 1 Sid. 465; *Bridges v. Mitchell*, Gilb. Eq. 129, 224; *Welford v. Liddell*, 2 Ves. 400; *Rouchandey v. Hammond*, 2 Johns. 200; *Franklin v. Camp*, Coxe 196.

And so, if the account is "ended." *Coster v. Murray*, 5 Johns. Ch. 522; *Welford v. Liddell*, 2 Ves. 400; 19 Ves. 180; *Martin v. Heathcote*, 2 Eden 169; *Crawford v. Liddell*, cited in 6 Ves. 580; *Duff v. East End Co.*, 15 Ves. 198; *Barber v. Barber*, 18 Ves. 286; *Ault v. Goodrich*, 4 Russ. 430; *Robinson v. Alexander*, 2 Cl. & Fin. 717; *Taton v. Williams*, 3 Hare 347.

Action of account lies not between partners. *Lindley on Part.* 729; *Colton v. Patridge*, 4 Man. & Gr. 271.

Neither the arbitration abandoned, nor non-suit, takes the case out of the operation of the statute. *Irvin v. Schooley*, 3 Harr. 269; *Cowart v. Perrine*, 3 C. E. Gr. 454; *S. C.*, 6 Id. 101.

Implied trusts are barred by statute; express trusts are not. *Barnes v. Taylor*, 12 C. E. Gr. 259; *McClane v. Shepherd*, 6 C. E. Gr. 76; *Miner v. Barnet*, 4 Wash. C. C. 631; *Ray v.*

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Bogert et al., 2 Johns. Cas. 436; *Coster v. Murray*, 5 Johns. Ch. 522.

Accounts between partners are not between merchants. *Carey on Part.* 88; *Bridge v. Mitchell*, Bunn. 217; 25 Beav. 421; *Whitley v. Lowe*, 2 De G. & J. 704.

The amended decree asserts the conclusiveness of the stated account in March, 1872, and if the "business" kept in Rafferty's private books had been known to Todd to have been transacted before that time, that stated account bars the whole of it and any right to have an accounting of it. *Brown v. Van Dyke*, 4 Hal. Ch. 795; *Hager v. Thompson*, 4 Hal. Ch. 495; 1 Bl. 80.

And the decree should state how far the accounting should extend. *Izard v. Bodine*, 1 Stock. 309

Mr. S. Tuttle, for respondent.

I. As pleas of the statute of limitations are admitted in courts of equity by analogy only, it follows that where the circumstances of the case are such as to make it against conscience to apply the rule founded upon analogy, the court will not enforce it. *Coll. on Part.* §§ 374, 375.

Courts of equity interfere in many cases to prevent the bar of the statute of limitations where it would be inequitable or unjust. *Story's Eq. Jur.* § 1521; *Bodn v. Hopkins*, 1 Sch. & Lef. 413, 431.

If, therefore, the bill states circumstances of fraud, and that complainant did not become apprised of them till after the period limited by the statute had expired, a plea of the statute of limitations will not prevail. *Daniell's Chan. Pl. & Pr.* 669; *Gould v. Gould*, 3 Story's C. C. 516.

The principle is admitted, both at law and in equity, that when the statute of limitations is pleaded to an action founded on fraud, a replication which avers ignorance of the fraud until within six years, is sufficient, and the ignorance so averred is traversable. *Horner v. Fish*, 1 Pick. 438; *First Mass. Turnpike Co. v. Fields*, 3 Mass. 201.

II. It has been expressly laid down that no partner who owes

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(a) That Iszard, under the grant from Stull, had no right to use the water flowing through his flume for any purpose other than to drive the fan of a cupola iron furnace.

(b) That Iszard used more water than he had the right to use. These contentions will be considered in their order :

First. The contention that Iszard was confined to any particular use of the water, save those uses which he covenanted against, is *res adjudicata* against the appellant. *Luttrell's Case*, 4 Coke 86 ; *Cromwell v. Selden*, 3 Comst. 253 ; *Pratt v. Lampson*, 2 Allen 275 ; *Bigelow v. Battel*, 15 Mass. 313 ; *Loverin v. Walker*, 44 N. H. 489 ; in this state, by the decision of this court, March term, 1881, in *Johnston v. Hyde*, 6 Stev. Eq. 632.

Second. The contention of the appellant that on September 5th, 1872, Iszard was using more water through his trunk or flume than he had a right to use, is untenable :

(a) Because the grant as originally made, when read as a whole, was of an undetermined quantity of water.

A certain number of square inches is mentioned, which, upon the contingency of the necessity of Iszard's business, was to be indefinitely increased.

The instrument granting the easement, by its terms, therefore, left something to be done by the parties thereto to fix or measure the quantity of water to which Iszard was entitled.

A standard of measurement was actually adopted by Stull and Iszard.

The quantity of water Iszard was and is entitled to use is measured by the trunk, flume, forebay and wheel constructed by Iszard, in Stull's presence, under his eye, and with his assent, and is the quantity actually used by Iszard for twenty-three years, until the flow thereof was cut off by the appellant, September 5th, 1872. 1 *Greenl. Evid.* § 301, note 2 ; 1 *Washb. R. P.* 673, 682 ; *Johnson v. Jaqui*, 12 C. E. Gr. 526, 529 ; *Kennedy v. Scovel*, 12 Conn. 317 ; *Salem Falls Manuf. Co. v. Portsmouth Co.*, 46 N. H. 249.

(b) Because, if Iszard had not the right under his grant from Stull, to use the quantity of water, as measured by the standard agreed upon between them, then his possession and use thereof

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was adverse from the moment it began ; it was open, notorious, continuous, exclusive, and, September 5th, 1872, had continued for more than twenty years.

It had, therefore, at that time, ripened into an easement, which the statute barred the appellant from disturbing by re-entry or otherwise. *Society &c. v. Holsman*, 1 Hal. Ch. 122 ; *Society &c. v. Low*, 2 C. E. Gr. 19, 28.

Cases as to adverse user. 1 Stew. Dig. 342.

III. Even if appellant's contentions were in all things sound, their action cannot be justified here, and we are entitled to a restoration of the *status quo*.

IV. The relief prayed for in the bill and granted by the decree appealed from, is the only remedy adequate to the proper relief of the complainant below.

V. The following authorities are referred to, bearing upon the general doctrine of specific performance or relief analogous to that prayed in the bill of complaint. 1 *Story's Eq. Jur.* §§ 7, 15, 716, p. 679 ; *Gariis v. Gariis*, 1 C. E. Gr. 82 ; *Locander v. Lounsberry*, 9 C. E. Gr. 417 ; *Hopper v. Hopper*, 1 C. E. Gr. 147.

The following authorities hold that courts of equity ought not to decline the jurisdiction of specific performance or analogous relief, whenever the remedy at law is doubtful in its nature, extent, operation or adequacy. *Story's Eq. Jur. vol. I.* § 728 pp. 692, 693 ; *Id.* § 751 ; *Storer v. Gt. Western R. R.*, 2 Y. & Coll. N. R. 48, 53 ; *Kilmorney v. Thackeray*, 2 Bro. C. C. 65 ; *Cheale v. Kerward*, 2 De G. & J. 27 ; *Stuyvesant v. Mayor &c.* 11 Paige 414 ; *Shimer v. Morris Canal & B. Co.*, 12 C. E. Gr. 364 ; *New Barbadoes Toll Bridge Co. v. Vreeland*, 3 Gr. Ch. 157, 160.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the chancellor in *Iszard v. Mays Landing Water Power Co.*, 4 Stew. Eq. 511.

McKeown v. McKeown.

MARY ANN McKEOWN, appellant,

v.

JOHN JAMES McKEOWN et al., respondents.

Mr. J. H. Lippincott, for appellant.

It is contended that a resulting trust under the facts will prevail in favor of the appellant, either—

1. To the undivided one-half part of this property, or
2. To the whole of it. *Co. Litt.* 249, 290 § 8; *Perry on Trusts* § 51; 2 *Washb. R. P.* 174; *Hall v. Young*, 37 *N. H.* 134.

When an agent fraudulently purchases land for himself with the money of his principal, he will be held as trustee therefor. *Wills v. Robenson*, 13 *Cal.* 133; *Perry on Trusts* §§ 124-165.

Mr. James Chapman, for respondents.

I. If this property was purchased with the complainant's money, and for her, John James was her trustee; but

"The law never implies; the court never presumes a trust except in cases of absolute necessity." *Baldwin v. Campbell*, 4 *Hal. Ch.* 891.

II. If a trust, it must be either a direct or implied trust.

(a) It cannot be a direct trust, for the statute of frauds expressly says that all declarations or creations of trust shall be in writing. *Statute of Frauds* § 13.

(b) It cannot be an implied trust; for "when a trust is sought to be raised as a resulting trust from the payment of the purchase-money, there must be very clear proof of the payment of the purchase-money by the person in whose favor a trust by implication is sought to be raised."

"A resulting trust will not be held to arise upon payments made by one asserting his claim in common with the grantee in

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the deed, when the consideration is set forth in the deed as moving solely from the latter, unless satisfactory evidence is offered exhibiting the portion which was really the property of each, and establishing the fact that the payment was made for some specific grant or distinct interest in the estate." *Cutler v. Tuttle*, 4 C. E. Gr. 549; *Shroser v. Isaacs*, 1 Stew. Eq. 320.

III. Delay in asserting the claim is an important consideration in determining whether there is a trust or not. *Midmer v. Midmer*, 11 C. E. Gr. 299, 12 C. E. Gr. 548; *Barnes v. Taylor*, 12 C. E. Gr. 266.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by the Chancellor in *McKeown v. McKeown*, 6 Stew. Eq. 384.

HENRY LUERS et al., administrators &c., appellants,

v.

PETER BRUNJES et al., respondents.

Mr. John Linn, for appellants.

The cases of *Besson v. Eveland*, 11 C. E. Gr. 468, and *Post v. Stiger*, 2 Stew. Eq. 554, and *Clarke v. Rosencranz*, 4 Stew. Eq. 665, all admit that if a wife be a *bona fide* creditor of her husband he may secure her in the same manner that he may secure any other *bona fide* creditor.

A husband indebted to his wife may prefer her as his creditor. *Monroe v. May*, 9 Kan. 473; *Drury v. Briscoe*, 42 Md. 155; *Rowland v. Plummer*, 50 Ala. 193; *Woodworth v. Sweet*, 44 Barb. 268, 51 N. Y. 8; *McCartney v. Welch*, 44 Barb. 271, 51 N. Y. 626; *Wallingford v. Allen*, 10 Peters 594; *Babcock v. Eckler*, 24 N. Y. 623; *Schaffner v. Reuter*, 37 Barb. 44;

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Jaycox v. Caldwell, 51 N. Y. 395; *Savage v. O'Neill*, 44 N. Y. 298; 2 *Story's Eq. Jur.* § 1373.

Messrs. Collins & Corbin, for respondents.

At common law, it was the rule that if a married woman authorized money settled to her separate use paid to her husband, or permitted him to receive her income, she could never recall it. *Caton v. Rideout*, 1 *Macn. & G.* 601; *Darnaby v. Darnaby*, 14 *Bush* 345.

Although the married women acts have introduced a new element into this class of cases, still the fact of the close relationship has always been reckoned of importance in determining whether the payment of money between husband and wife is to be regarded as a loan or a gift. *Steadman v. Wilbur*, 7 *R. I.* 486; *Paulk v. Cooke*, 39 *Conn.* 571; *Edelen v. Edelen*, 11 *Md.* 420; *Kuhn v. Stansfeld*, 28 *Md.* 210; *Humes v. Scruggs*, 4 *Otto* 92; *Annin v. Annin*, 9 *C. E. Gr.* 189; *Besson v. Eveland*, 11 *C. E. Gr.* 471; *Clarke v. Rosencranz*, 4 *Stew. Eq.* 665.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by Vice-Chancellor Van Fleet in *Luers v. Brunjes*, 7 *Stew. Eq.* 19.

FERDINAND HEINTZE et al., appellants,

v.

RANSOM BENTLEY, respondent.

1. If a mortgage, given to secure a debt actually due, be drawn for a larger sum, with intent, on the part of both mortgagor and mortgagee, to delay, hinder or defraud the creditors of the mortgagor thereby, it will be adjudged void at the instance of those creditors, and will not be allowed to stand against them, even as security for the real debt.

2. A mortgage, drawn for \$7,000, was accepted by the mortgagee as security for a real debt of \$1,300, without any purpose on his part to delay, hinder or

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defraud the creditors of the mortgagor. Afterwards the mortgaged premises were sold by the sheriff under an execution upon a judgment prior to the mortgage, and parties holding judgments subsequent to the mortgage refrained from bidding at the sale, under the belief that the mortgage debt was \$7,000, and so would absorb all the surplus proceeds of a fair price, and the mortgagee became the purchaser. It also appeared that if these parties had known the truth, they would have bid such a price as would have realized something on their judgments.—*Held*, that at their instance the sale must be set aside, even though the mortgagee had, in the meantime, conveyed the premises to the wife of the mortgagor, receiving her bond and mortgage for the purchase-money.

3. If a first mortgagee have knowledge of the existence of a second encumbrance on the estate, he will not be entitled to priority for subsequent advances, provided it was optional with him whether to make such advances or not.

4. In the absence of any agreement to the contrary, a tenant for years makes repairs at his own expense.

On appeal from a decree of the chancellor, whose opinion is reported in *Bentley v. Heintze*, 6 *Stew. Eq.* 405.

Mr. E. D. Deacon, for appellant Heintze.

I. No fraud is established by the proofs.

II. Heintze acquired the legal title to the premises by lawful purchase, with his own money, at a fair sale, to which he was not a party, and at which he was an indifferent bidder—the act of purchase not being consequential to, or superinduced by, any fraud or act tainted by fraud. The vendor had a right to sell, and was guilty of no fraud in selling; the buyer a right to purchase, and purchased with his own money. From this purchase Mrs. Wanner takes title, and Heintze, upon his own warranty deed, secures his own \$4,000 mortgage. *Halsted v. Davison*, 2 *Stock.* 294; *Van Keuren v. McLaughlin*, 4 *C. E. Gr.* 187; *Kline v. McGuckin*, 9 *C. E. Gr.* 411; *Ward v. Cooke*, 2 *C. E. Gr.* 93, and cases cited.

Messrs. Collins & Corbin, for Hannah Wanner.

I. Hirsch and Childs were *bona fide* judgment creditors; and

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a purchaser under execution on their judgment, whether with or without notice of frauds by Wanner, obtains the same title that Hirsch and Childs would have obtained if they had bought.

II. There was no fraud in the sale.

III. Heintze knew of no fraudulent design in making the mortgage for \$7,000. *Spindler v. Atkinson*, 3 Md. 409; *Gilbert v. Carter*, 10 Ind. 16.

IV. There was no fraud on the part of Heintze.

V. Hannah Wanner was a purchaser for value without notice of fraud.

VI. Complainant and Cushing have no claim for relief, because of their negligence.

Mr. Charles H. Hartshorne, for respondent.

I. The \$7,000 mortgage, dated August 18th, 1876, was made to hinder creditors, and Heintze connived at the fraud.

The circumstances are proof of fraud sufficient to nullify the mortgage. *Bump on Fraud. Con.* (2d ed.) 33; *Butts v. Peacock*, 23 Wis. 359.

That a false and exaggerated statement of the consideration *prima facie* shows fraud. *Thompson v. Drake*, 3 B. Mon. 565; *Marriott v. Givens*, 8 Ala. 694; *Bump on Fraud. Con.* 42; *Randall v. Vroom*, 3 Stew. Eq. 353.

II. Heintze purchased at the sheriff's sale in pursuance of a secret agreement between Heintze and Wanner for the purpose of securing the property to Wanner, and protecting it from his creditors.

III. The purchase by Heintze being made by arrangement with Wanner, for the latter's benefit, and to hinder creditors, it is, under the statute of frauds, void, and no title passed at law. *Dobson v. Irwin*, 1 Dev. & Bat. 569; *Morris v. Allan*, 10 Ired. 203; *Abney v. Kingsland*, 10 Ala. 355; *Stoval v. The Farmers Bank*, 8 Sm. & Marsh. 305; *Ewing v. Gray*, 12 Ind. 64; *Crary v. Sprague*, 12 Wend. 41; *Bump on Fraud. Con.* 255, 258.

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IV. The \$7,000 mortgage and the sheriff's sale to Heintze having been fraudulent in fact as against creditors, the court will not permit either to stand for any part of their consideration. All Heintze's claims growing out of them must be postponed to the judgments. *Demarest v. Terhune*, 3 C. E. Gr. 539; *Holland v. Cruft*, 20 Pick. 321; *Williamson v. Goodwin*, 9 Gratt. 503; *R. R. Co. v. Soutter*, 13 Wall. 517; *Sands v. Codwise*, 4 Johns. 536.

The same principle is recognized in the cases of *Miller v. Sauerbier*, 3 Stew. Eq. 71; *Schmidt v. Opie*, 6 Id. 138; *Smith v. Vreeland*, 1 C. E. Gr. 198. See, also, *Neligh v. Michenor*, 3 Stock. 539.

The opinion of the court was delivered by

DIXON, J.

The bill is filed to set aside a mortgage for \$7,000 given by John J. Wanner and wife to Ferdinand Heintze, dated August 18th, 1876, and recorded August 21st, 1876, and also a conveyance of the mortgaged premises made by the sheriff of Hudson county to Heintze on January 18th, 1877, under an execution issued July 8th, 1876, on a judgment of the supreme court against Wanner at the suit of Hirsche et al. The complainant is a judgment creditor of Wanner, and obtained a lien upon the premises, by levy, September 14th, 1876. Nicholas B. Cushing, a defendant, is another judgment creditor, whose levy was made September 12th, 1876.

The complainant claims that the mortgage and conveyance were contrived by Wanner and Heintze for the purpose of defrauding Wanner's creditors.

The evidence shows that at the time the mortgage was given, Wanner owed Heintze only about \$1,300, and the circumstances led the chancellor to the conviction that it was made for the sum of \$7,000, with the fraudulent design charged. Nevertheless, the chancellor decreed that it should stand as a valid security for the sum actually due. If the same conclusion upon the proofs had been reached in this court, we would not have been able to sup-

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port this judgment. It is well settled that a deed fraudulent in fact against creditors is absolutely void as to them, and cannot be permitted to withstand them for any purpose. This principle is embodied in the very language of the statute for the prevention of frauds and perjuries; and as early as *Twyne's Case*, 3 Rep. 80, about thirty years after the statute was passed, it was adjudged that under that law there must be not only a good consideration, but also *bona fides*, to support a conveyance against creditors. So it has been held ever since. *Demarest v. Terhune*, 3 C. E. Gr. 532, 540; *R. R. Co. v. Soutter*, 13 Wall. 517.

But we have been unable to arrive at a similar belief upon the facts. It appears that, before the giving of this mortgage, Wanner was not only indebted to Heintze as before stated, but was also requesting further advances. Heintze, however, knowing that Wanner had met with some pecuniary losses, refused to make any more loans until he was secured, and thereupon Wanner directed this mortgage to be drawn, and delivered it to Heintze. The latter, we believe, accepted it without regard to any other consideration than that it secured him for what was already due, and what he might thereafter choose to loan. Such inadvertence on the part of a man like Heintze, a saloon-keeper, is not improbable, and, while some suspicion hangs around the transaction, there is not furnished that clear proof of participation by him in a fraudulent intent which would require us to strip him of security for his honest debt. We, therefore, approve of the decree of the chancellor, that Heintze is entitled to a lien prior to that of the complainant for the sum owing when the mortgage was made.

But this priority cannot be extended, as Heintze claims it should be, to the advances subsequently made, for the reason that he had not bound himself to make further advances, and, before he actually made any, he had notice, by certain proceedings, to collect the surplus on the Hirsche sale, of both the Cushing and the Bentley judgments. The rule in such cases is, that if a first mortgagee have knowledge of the existence of a second encumbrance upon the estate, he cannot make further loans upon his mortgage to the disadvantage of the second encum-

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brance, when it is entirely optional with him whether to make further advances or not. *Hopkinson v. Rolt*, 9 H. L. Cas. 514; *Ward v. Cooke*, 2 C. E. Gr. 93.

We come next to the sheriff's sale. This, also, we think, was free from actual fraud. The execution under which it was made was confessedly untainted, and was a first lien, except taxes, upon the premises. Wanner had obtained all the adjournments possible, in the hope of averting a sale, or saving his property from what he feared would be a sacrifice, but was still helpless. Heintze not only held the mortgage, but was tenant of the premises under Wanner, and had a lucrative business established in them. He had not heard of the contemplated sale until a week before it took place, when the sheriff informed him of it. On the day of sale, he attended for the purpose of buying the property solely in his own interest, but just before the sale began he was induced by Wanner and his counsel to agree that if he became the purchaser, Wanner's wife might redeem the property on paying what was due him. Such a transaction was not fraudulent against creditors. At most, it transmuted the sale into a mortgage, and the right of redemption which Wanner secured, nominally to his wife, substantially to himself, his creditors might, on equitable terms, appropriate to themselves. To this the complainant is entitled, under the chancellor's decree.

There is also another element in this affair which renders it inequitable to regard the sale as conclusive against the complainant. The property was worth from \$6,000 to \$7,000, subject to indefinite deduction, because of a defect in the title, which has since been cured by decree in chancery. The actual encumbrances prior to that of the complainant were:

Taxes.....	\$619 49
Hirsche judgment.....	316 29
Heintze mortgage.....	1,252 31
Cushing judgment.....	448 51
Total.....	<hr/> \$2,636 60

It satisfactorily appears that the attorney of the complainant

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would have bid for the property much more than this amount, so as to secure a considerable sum to be applied on his judgment, had he known that the encumbrances were so small; but believing that the Heintze mortgage was, as it appeared, for \$7,000, he refrained from bidding, because he thought no reasonable price could produce anything toward the payment of his debt. Thus was the complainant deceived, to his injury. If Heintze were entirely free from blame with reference to the apparent amount of this mortgage, it might not be just for the court to interfere with his purchase, because of the complainant's mistake. Had his mortgage originally secured \$7,000, and been reduced by payments to \$1,300, or even had it been given upon an agreement to make advances which would reach or approximate \$7,000, the record would not have misrepresented the true intentions of the parties, and the complainant might have fairly been required to ascertain by inquiry the real facts co-existent with these intentions. But the proof shows that Heintze never designed to make any loans which would at all justify the giving of a mortgage for so large a sum, and while we acquit him of an actual purpose to hinder Wanner's creditors, it is manifest that his conduct, in taking this mortgage and putting it upon record without any intimation of the truth concerning it, was likely to mislead those creditors, and was not characterized by a due regard for their interests. The complainant had a right to assume that the mortgage was properly given, and neither Wanner nor Heintze can complain that he did not make inquiries which might have led to a disclosure of their own culpability. He did so assume, and, in consequence, has lost the advantages which he might have gathered from a perfectly fair sale of these premises, and Wanner and Heintze are claiming the benefits of an unfair sale, induced by their own wrong. This is contrary to equity, and the sale should be set aside.

It is urged, on behalf of Heintze, that he was not the buyer at the sheriff's sale; that the property was struck off to Hirsche, and that Heintze took by assignment from him, and that, since he was not at all to blame, his title was unimpeachable, and that title was transmitted to Heintze. But it is quite clear, from all

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the circumstances, that Heintze would not have allowed the property to be sold to Hirsche at the price bid, unless there had been an understanding that Hirsche should buy it for Heintze. The bid must, therefore, be regarded as Heintze's, and subject to all the equities existing against him.

Subsequently, in pursuance of the agreement for redemption before spoken of, Heintze conveyed to Mrs. Wanner, and received from her a bond and mortgage for \$4,000, which represented what Wanner then owed Heintze. This transfer cannot stand as any hindrance to the relief which the complainant seeks. Mrs. Wanner has not parted with anything of value which the decree of the court will not wholly restore to her. When her deed falls, the bond and mortgage given therefor will go with it.

It appears that since the sheriff's sale, Heintze has remained in possession of the premises, occupying the same relation as before the sale, regarding himself, not as owner or mortgagee in possession, but as tenant of Wanner, and paying him rent under the pre-existing lease. During this period, he has paid taxes, and made some necessary repairs, and for the expenditures so incurred, he claims allowance, in case his title be disturbed. The chancellor has allowed his claim for taxes, and justly, since, as tenant, he was under no primary obligation to pay them, but appears to have discharged them upon an understanding with Wanner, the owner, and for his accommodation. They constituted the first lien upon the premises, and Heintze is equitably entitled to a similar lien for his re-imbursement. But as to the repairs, the matter stands upon a different footing. It does not appear that, in the lease under which Heintze paid rent, there was any covenant binding the landlord to make repairs. And it is well settled that no such obligation is implied by law. *Leavitt v. Fletcher*, 10 Allen 119. And that in the absence of a special agreement to the contrary, the tenant makes repairs at his own expense. 4 Kent *110; *Mumford v. Brown*, 6 Cowen 475. And that if he permit the demised premises to go to waste for want of necessary repair, he becomes answerable in damages to the landlord. *Moore ads. Townshend*, 4 Vr. 284. Heintze having chosen throughout to consider himself in pos-

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session as tenant merely, must be content to bear the burdens of tenants, and, as the evidence discloses no agreement to relieve him from the operation of the rules just mentioned, he has established no right to repayment of the moneys expended in this behalf.

The decree below should be affirmed.

Both parties having appealed, no costs in this court will be awarded to either.

Decree unanimously affirmed.

ELIZA R. HAYDOCK, appellant.

v.

EDEN HAYDOCK'S exrs., respondents.

1. When a person whose mind is enfeebled by disease or old age, is so placed as to be subjected to the influence of another person, and makes a voluntary disposition of property by gift in favor of such person, the court requires proof of the fact that the donor understood the nature of the act, and that the act was not done through the influence of the donee.

2. Where it is obvious that a gift made by such person is intended to operate as a will, it presents an additional reason for imposing upon the donee the burden of showing convincingly the validity of the act.

On appeal from a decree advised by Vice-Chancellor Van Fleet, whose opinion is reported in *Haydock v. Haydock*, 6 *Stew. Eq.* 494.

Mr. J. R. English and *Mr. B. A. Vail*, for the appellant.

A gift *inter vivos* is good in equity, unless prejudicial to creditors, or the donor was under legal incapacity or circumvented by fraud. 3 *Wail's Actions and Defences* 493; *Betts v. Francis*, 1 *Vr.* 155.

There is no claim of prejudice to creditors. In the absence

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of such, the gift is not only *prima facie* good, but is favored in equity. It was by a husband to his wife. *Mews v. Mews*, 15 Beav. 529; *Deming v. Williams*, 26 Conn. 226; *Jennings v. Davis*, 31 Conn. 138; *Shuttleworth v. Winter*, 55 N. Y. 624; *Draper v. Jackson*, 16 Mass. 480; *Dills v. Stevenson*, 2 C. E. Gr. 413.

Black v. Black, 3 Stew. Eq. 215-219, holds a gift from a wife to husband good. The same reasons will make good one from the husband to the wife.

The legal requisites of transfer by wife to husband were observed. *Dills v. Stevenson*, 2 C. E. Gr. 413.

It is claimed by appellees that the evidence shows loss of memory. Our courts have decided this to be insufficient. *Stackhouse v. Horton*, 2 McCart. 202; *In re Vanderveer's Will*, 5 C. E. Gr. 561.

They add old age. The decisions are that proof of both is not sufficient. *Turner v. Cheeseman*, 2 McCart. 243; *Whitenack v. Stryker*, 1 Gr. Ch. 8.

They further urge that he was prejudiced against his daughter. This would be no cause for setting aside his will, even if the prejudice amounted to monomania. *Trumbull v. Gibbons*, 2 Zab. 117; *Stackhouse v. Horton*, *supra*.

Further, that the gift was unjust. This is insufficient to set aside a will. *Boylan ads. Meeker*, 4 Dutch. 274; *Wintermute's Will*, 1 Stew. Eq. 437.

The existence of undue influence is never presumed, but must be a conclusion. *In re Humphrey's Will*, 11 C. E. Gr. 513-521; *Moore v. Blauvelt*, 2 McCart. 367.

If the transfer was made in lieu of provision by will, and is looked upon as having no more weight than a will, fraud should not be presumed because possible or even probable. *In re Vanderveer's Will*, 5 C. E. Gr. 463.

Undue influence is never presumed. *Baldwin v. Parker*, 99 Mass. 79; *Small v. Small*, 4 Greenl. 224; *Boyse v. Cossborough*, 6 H. L. Cas. 2; *Tyler v. Gardner*, 35 N. Y. 559.

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Mr. Garret Berry and Mr. J. Henry Stone, for respondents.

I. To constitute a valid gift *inter vivos*, the donor, at the time of the gift, must possess a mind of sufficient strength—

(a) To understand the nature of his property and of his obligations to his family.

(b) To permit him to interfere with any former disposition by will with judgment and discretion.

(c) To act with reason according to a fixed judgment and a settled purpose of his own.

(d) To possess the power if he has the will to do or not do any given act. *Harrison v. Rowan*, 3 Wash. C. C. 385; *Den v. Johnson*, 2 South. 454; *Marsh v. Tyrrell*, 2 Hagg. 122; *Harewood v. Baker*, 3 Moo. P. C. 282; *Stultz v. Schaeffle*, 18 Eng. L. and Eq. 576; *Boyd v. Ely*, 8 Watts 71; *Shropshire v. Reno*, 5 J. J. Marsh. 91.

II. The influence of a donee over the donor, especially where there is a confidential relationship between the parties, is undue unless the gift is voluntary, unadvised, unassisted and righteous. *Huguenon v. Baseley*, 14 Ves. 299; *Todd v. Grove*, 33 Md. 188; *Rhodes v. Bate*, L. R. (1 Ch. App.) 256; *Billage v. Souther*, 9 Hare, 540; 15 Beav.; *Gibson v. Russell*, 2 You. & Coll. 115; *In re Greenfield's Est.*, 14 Pa. St. 505; *Sears v. Shafer*, 6 N. Y. 268; *Pashe v. Ollat*, 2 Phillim. 323; *Stoinburne on Wills* 9; *Redfield's Am. Cas.* 466, 468; 2 Beav. 128, 141; *Blackford v. Christian*, 1 Knapp 73; 1 Story's Eq. Jur. § 250; *Gartside v. Isherwood*, 1 Bro. C. C. 560.

The opinion of the court was delivered by

REED, J.

This bill is filed to set aside certain gifts made by Eden Haydock to his wife. Eden Haydock died April 25th, 1879. The first gift was made February 24th, 1879, of nine shares of the stock of the United New Jersey Railroad and Canal Companies and seven bonds of the city of Rahway. The second gift was made March 10th, 1879, of a promissory note for \$5,000. Mr. Haydock had made a will eight years before, providing for his wife, which will was, at the time of his death, unrevoked.

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The evidence in the case has impressed me with the conviction that at the time when these transfers were made, the mind of the donor approached so closely to the line which defines the limit of legal mental capacity, that upon the ground of a want of such capacity I should incline to hold that these gifts were void.

The numerous instances of forgetfulness proven by the officers of the bank of which he was a director, and by artisans and business men with whom he had dealt, displays a mind upon which the business occurrences with which he was concerned left but a feeble impression.

It is, of course, entirely true that the memory may be quite imperfect and yet not make a state of mind which would avoid a disposition of property by gift or by testament. *Turner v. Cheesman*, 2 *McCart.* 243; *Stackhouse v. Horton*, 2 *McCart.* 202; *In re Vanderveer's Will*, 4 *C. E. Gr.* 561. Nevertheless, a considerable degree of business recollection is an obvious prerequisite to such a disposition. An apprehension of the present *status* of a man's business affairs is absolutely essential as a base for an intelligent shifting of their position. This involves, of course, the power to recall what has already been done. A person who is oblivious of a former disposition of his property is as unfit to make a subsequent disposition thereof as if he was under an insane delusion as to its extent and character. Now, by the testimony of numerous witnesses, it appears that the mind of Mr. Haydock was so disorganized that the remembrance that he had done any of the recurring business acts which he had been accustomed to transact faded from his mind almost as soon as they were done, and he would, within a short period of time, offer to do the same act again and again. In the face of this evidence it would be difficult to conclude that, at the time when he made these gifts, he had such a recollection of the *status* of his property, particularly of the disposition which he had already made by the will of 1871, as to permit him to make a legal divestiture of any of it by gift. If the case stood upon this ground alone, I should incline to the opinion that a sufficient degree of capacity did not exist.

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But if we admit that the donor was a person who possessed sufficient mental power to make a gift, yet I think it is upon the recipients of those gifts to show the fairness of the transaction. Here was a man of weak mind and feeble body. All the evidence in the cause shows that the wife was the one upon whom he naturally leaned. She watched his movements and cared for his wants, and he submitted himself to her control. She naturally and necessarily became the head of the house. While they so lived together, and while none but the wife and her brothers were about him, without the advice of disinterested counselors, the old man made these gifts of which she was the recipient.

I take the rule to be settled that where a person enfeebled in mind by disease or old age, is so placed as to be likely to be subjected to the influence of another, and makes a voluntary disposition of property in favor of that person, the courts require proof of the fact that the donor understood the nature of the act, and that it was not done through the influence of the donee. *Huguenin v. Boseley*, 2 L. C. in Eq. (4th Am. ed.) notes, pp. 1183-1185, *American notes* pp. 1192-1194.

The presumption against the validity of the gift is not limited to those instances where the relation of parent and child, guardian and ward or husband and wife, exists but in every instance where the relation between donor and donee is one in which the latter has acquired a dominant position. The parent, by age, may come under the sway of his children. *Highberger v. Stiffler*, 21 Md. 338. And so, as in the present case, the husband may become the dependent of the wife, and their natural position become reversed.

The ecclesiastical courts have declared a rule of evidence in regard to wills executed by persons of weak mental condition. The presumption is that a person who executes a will knows the nature of its contents. Proof of its execution, therefore, is all that is required of the proponent. But, if it appears that the testator was of a weak mind, and a bequest is made to a person who stood in a position which would have enabled the beneficiary to influence the act, the burden is shifted and a more rigid

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rule is enforced, and probate will not be granted unless the court be satisfied, by additional evidence, that the paper presented does really express the true will of the testator. *Taylor on Ev.* § 160.

The presumption of undue influence, however, does not also arise from the same state of facts, in the case of a gift, because the rule in regard to what constitutes undue influence differs when applied to wills and when applied to gifts. *Boyse v. Rossborough*, 6 H. L. Cas. 149; *Parfitt v. Lawless*, L. R. (2 P. & D.) 462.

The influence which is undue in cases of gifts *inter vivos*, is very different from that which is required to set aside a will. In testamentary cases, undue influence is always defined as coercion or fraud, but, *inter vivos*, no such definition is applied. Where parties hold positions in which one is more or less dependent upon the other, courts of equity hold that the weaker party must be protected, and they set aside his gifts if he had not proper advice independently of the other. *Huguenin v. Baseley supra*, notes p. 1271.

In the present case, these gifts, while gifts *inter vivos*, were undoubtedly intended by the donee to operate as a testamentary disposition of the donor's property. It is clear that the physical condition of the donor was critical, and his days brief in number. The presence of Mr. Anderson and the talk with him about drawing a will, and also the conversation detailed by Bayright, which he says he had with Mr. Haydock in the garden, point to the conclusion that it was supposed that the life of the donor would be brief, and that some disposition of his property, in view of his death, was requisite. For some reason, the will was never drawn, and it is transparent that the gifts were executed to fill the place of a will.

Now it seems to me, that, where it is apparent that a gift is made to accomplish the purpose of a will, to operate as such an instrument, without being surrounded by the formal guards which the statute has provided for the execution of a will, it raises an additional reason why a gift like this should be scanned with circumspection, and why the donee should clearly and convincingly show the validity of its execution.

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I entirely concur with the vice-chancellor that, instead of this being shown, it appears that the donor was surrounded with dominant influences which favored the donations, and the presumption that they actually fostered the act is supported by all the testimony in the case bearing upon their conduct toward the donor.

The decree should be affirmed, with costs.

MAGIE, J.

I vote to affirm the decree below, but prefer to put my vote solely on the ground of the incapacity of Mr. Haydock to make the gifts in question in this cause. I think there is, in the evidence, ample proof that deceased did not possess that degree of mental capacity which, even under the lenient rules on the subject, adopted in this state, will justify us in establishing such a disposition of his property. In the opinion of the vice-chancellor, the case presents on this point an "almost insoluble difficulty." It certainly is not free from difficulty. But a careful examination of the evidence convinces me that there is quite sufficient proof to justify the conclusion above stated.

If compelled to decide this case upon the question of undue influence, I should have great difficulty. The careful and deliberate judgment of the vice-chancellor, pronounced after an opportunity to see and hear the witnesses, has, and ought to have, great weight. It ought not to be reversed, unless clearly wrong. It is undoubtedly proved that Mr. Haydock was in a condition susceptible to influence. There are circumstances justifying serious suspicion that some influence was exerted on him. But it seems to me very questionable whether there is anything in the evidence justifying the inference that the influence was undue. I should, therefore, find difficulty in concluding that there is sufficient proof to justify this court in setting aside these gifts if Mr. Haydock had capacity to make them. But the decree is right, on the ground first mentioned, and I therefore vote to affirm.

PARKER, J., (dissenting).

The bill in this cause was filed by the executors of Eden

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Haydock, deceased, to declare void alleged gifts, made several weeks before his death, to his wife, and to compel the surrender of the securities claimed to have been given her, to the executors, for the benefit of the estate.

The estate is solvent, and the rights of creditors are not involved in the controversy.

Proof of the transfer and delivery of the securities to Mrs. Haydock was made, and it is not denied that the gifts were perfect, if the donor, at the time, was of sound mind, and not controlled by undue influence.

To show mental incapacity, or undue influence, the burthen of proof was on the complainants. I agree with the vice-chancellor, that the proof is not sufficient to justify a decree declaring the gifts void, on the ground of mental incapacity. The evidence does not satisfy me that there was any improper influence employed to induce the gifts. After the death of his son, it was natural that Mr. Haydock should give something more than the will provided to the mother of that son. The treatment of Mr. Haydock by the daughter and her husband, of which he complained bitterly, was such as to induce the gifts. Under the circumstances, the disposition of his property, by Mr. Haydock, was not unnatural nor unreasonable.

I am constrained to dissent from the conclusion reached by the other members of the court, and therefore vote to reverse the decree.

For affirmance—BEASLEY, C. J., DIXON, KNAPP, MAGIE, REED, SCUDDER, VAN SYCKEL, CLEMENT, COLE, GREEN, WHITAKER—11.

For reversal—PARKER—1.

Absent—DODD, LATHROP—2.

Currie v. Sisson.

WILLIAM WARWICK, appellant,

v.

ELIZA A. DANSER, respondent.

Mr. M. Beasley, jun., for appellant.

Mr. C. Robbins, for respondent.

PER CURIAM.

This decree unanimously affirmed, for the reasons given by Vice-Chancellor Van Fleet in *Danser v. Warwick*, 6 *Stew. Eq.* 133.

CATHARINE H. CURRIE, appellant,

v.

ELIZABETH R. SISSON, respondent.

Mr. Charles H. Hartshorne, for appellant.

Mr. Lansing Zabriskie, for respondent.

The bill was filed August 23d, 1879, by Elizabeth B. Sisson against Catharine H. Currie. It is the ordinary form of a foreclosure bill, and sets out a bond made January 15th, 1875, by Catharine H. Currie to Augustus A. Hardenburgh, John H. Browning and Lansing Zabriskie, executors of Charles G. Sisson, deceased, for \$10,000, payable January 15th, 1878, with

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interest at seven per cent., payable half yearly. It sets out the execution of a mortgage by the obligor to the obligees of even date with the bond, upon the premises described in the petition in the cause; that the bond and mortgage were assigned by deed of assignment, dated November 18th, 1875, to John H. Browning, and by him assigned by deed of assignment December 7th, 1878, to the complainant; that the whole of the principal was due. The usual prayers followed for answer under oath, for an account of the amount due upon the bond and mortgage, for sale of the mortgaged premises, for foreclosure, and for a decree against Catharine H. Currie for any deficiency that there might be of the proceeds of sale to pay the mortgage debt, with costs. The defendant entered an appearance on the 14th of October, 1879, but filed no plea, answer or demurrer. The defendant also took an order to stay execution. The final decree, dated November 21st, 1879, ascertained the amount due upon the mortgage debt to be \$10,945; decreed that the mortgaged premises be sold to pay that amount, with interest from the date of the decree, and costs; that the premises be sold, and that the equity of redemption be foreclosed. The decree also contained the following:

"And it is further ordered, adjudged and decreed that in case the proceeds of such sale shall be insufficient to satisfy and discharge the said mortgage debt, interest and costs, then the deficiency shall be paid by the said defendant, Catharine H. Currie, as especially prayed in the bill of complaint, it appearing to the court that notice that such relief was sought by said bill has been duly served and given to said defendant according to the rules and practice of this court, and that a writ of *feri facias* therefor do issue against her for that purpose, when such deficiency shall have been duly ascertained."

The decree for deficiency was in the following words, viz.:

"And that in case the proceeds of such sale shall not be sufficient to satisfy the amount of principal, interest and costs so due to your oratrix, the said Catharine H. Currie may be decreed to pay the deficiency."

A writ of *feri facias* was issued upon the said decree to the sheriff of Hudson county, and was returned August 5th, 1880, with a statement thereto annexed by the said sheriff, showing

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that the said property had been sold for \$500, and showing a deficiency of \$11,001 in the proceeds of said sale, to pay the amount due upon the said execution, including the sheriff's fees.

On August 23d, 1880, a petition was filed by complainant, seeking to be relieved from the decree.

Thereupon the following order was entered, by the advice of Vice-Chancellor Van Fleet:

"The defendant having filed her petition praying to be relieved from the decree holding her liable to pay the deficiency of the proceeds of sale of the mortgaged premises, to pay the mortgage debt, and the court being of opinion that the petitioner is not entitled to relief in the premises:

"It is ordered, on this 3d day of March, 1881, that the said petition be dismissed."

The vice-chancellor adopted the opinion in *Snyder v. Blair*, 6 *Stew. Eq.* 208, as the opinion in this case.

PER CURIAM.

This order unanimously affirmed, for the reasons given by Vice-Chancellor Van Fleet.

NEW JERSEY AND NEW ENGLAND TEL. Co., appellant,

v.

JERSEY CITY, respondent.

Mr. Flavel McGee, for appellant.

Mr. Allan McDermott, for respondent.

PER CURIAM.

This order unanimously affirmed, for the reasons given by Vice-Chancellor Van Fleet, in *New Jersey and New England Tel. Co. v. Jersey City*, 7 *Stew. Eq.* 117.

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A.

Accident and Mistake.

1. A policy of insurance was issued to and in the name of the complainant's wife, on his property, upon her application. Complainant alleged that the policy was taken out by her in her own name instead of his, by mistake on her part. Reformation after loss refused, on the ground that there was no proof of mutual mistake, nor of fraud on the part of the company. *Doniol v. Commercial Fire Ins. Co.*, 80
 2. Gross mistake is where the quantity of land conveyed falls so far short of the quantity represented as clearly to warrant the conclusion that the grantee would not have contracted had he known the truth. *Melick v. Dayton*, 245
 3. A mechanics' lien-claim was entitled to priority over a mortgage on the premises, but owing to the carelessness of the county clerk in making up the record, the judgment on the lien-claim was entered as a *general* judgment, and hence the master, on the foreclosure of the mortgage, reported that the mortgage was a prior encumbrance. The mistake was not discovered by the holder of the judgment until after the sale on the foreclosure. The property was bought by the mortgagee.—*Held*, that the priority of the judgment could be established, and that complainant had not forfeited his right to redress through laches, the delay having been caused by his endeavor to obtain his just demand without resort to litigation. *Kline v. Cutter*, 329
 4. Lands were bought and paid for by a corporation, but the deed, by mistake, was drawn in the individual name of its treasurer as grantee. The corporation, however, openly used and occupied the premises thereafter.—*Held*, that personal judgments against the treasurer were not liens on the premises, and that the corporation was entitled to relief against the purchaser at sheriff's sale, under such judgments, notice of the corporation's rights having been given at the sale, and that the corporation was not estopped by bidding at such sale. *Holmdel and Keyport Turnpike Co. v. Conover*, 364
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See INJUNCTION, 6.

Appeal.

1. An order allowing executors \$500, for services rendered the estate, was made by the orphans court in January, 1880. The surviving executor filed his account in June, 1880, and prayed allowance for the \$500, and also for \$50 paid by him to the *cestui que trust*, out of \$250 of the principal which had been paid in. To this account the *cestui que trust* excepted, because the allowance of the \$500 was excessive, and also excepted "to the money collected on the principal of said estate." Both exceptions were disallowed, and on appeal—*Held*, (1), that the appeal from the allowance of the June account did not bring up for review the allowance of the \$500 under the January order. (2), that whether the executor was chargeable with interest on the \$200 of the principal remaining in his hands, could not be considered, because no exception on that ground was taken below. *Luse v. Rarick*, 212
2. By statute, appeals from certain orders of the orphans court must be demanded within three months. On June 18th, 1880, an order was signed, and on the same day marked filed by the surrogate, who did not know its contents. It remained in the surrogate's office until July 17th, 1880, when it was inadvertently sent up to the prerogative court with the papers in another appeal between the same parties, on a decree rendered in the settlement of the same estate. It remained there until discovered on February 10th, 1881, when it was taken back to the surrogate's office, and, by order of the orphans court, on February 18th, 1881, marked refiled. The evidence showed that the surrogate had been frequently applied to, in the meanwhile, by the proctor of the appellants, and, in ignorance or forgetfulness of the order, had informed him that no order in the case had been made. Careful search for the order was also made in the surrogate's office, by the surrogate and the proctor.—*Held*, that the orphans court had no power to direct the order to be refiled, so as to extend the time for appealing, but, nevertheless, that the appellant could not, by the mistake of the surrogate, be deprived of his right of appeal. *Mount v. Van Ness*, 512

Assignment for Creditors.

1. After the damages have been assessed against an assignee and his surety, on their bond given under the assignment act, the surety cannot have the amount of a creditor's claim deducted therefrom, on the ground that it was not presented to the assignee under oath, where such claim was allowed and included in all of the assignee's accounts, and no creditor objects thereto. He is bound to answer for all the money found due from his principal. *Stelle's Case*,

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See FRAUDULENT CONVEYANCES, 13; JUDICIAL SALES, 3.

Attachment.

See CREDITOR'S BILL, 1; INJUNCTION, 6.

B.**Bank.**

1. On Tuesday, November 9th, 1880, the directors of a bank discovered that the cashier had embezzled the funds, but not to such an extent, as they then supposed, as to render the bank insolvent, and the bank continued business. On Wednesday, the complainant, a dealer with the bank, deposited about \$600 in cash and checks, which were credited in his bank-book, and the checks duly forwarded for collection, and credited to the bank by its correspondent. On Thursday, the bank suspended through insolvency.—*Held*, that complainant's deposit was not entitled to preference in payment over those of other depositors. *Terhune v. Bank of Bergen County*.

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Charity.

1. A gift of a fund to establish and maintain a school of learning is a charitable trust. *Taylor v. Trustees of Bryn Mawr College*, 101
2. This court will not administer a foreign charity, but where such a charity is valid by the laws of this state, and by the laws of the state where it is to be executed, and the trustees have the legal capacity to receive the fund and carry out the charity, this court will order its payment to them. *Id.*, 101
3. A testator appointed two executors, and named two others to act in case of the death or declination of the former, with authority in the survivor to nominate a co-executor with full power to exercise the same discretion in the management and disposition of the estate as the original appointees possessed. He gave to his two sisters, for their joint lives and that of the survivor, as a residence, his real estate in M., called "the Cottage," with the appurtenances, lands, &c., with a gift over to his executors as trustees, to sell the premises and to invest the proceeds and apply the income to purchasing books and founding a useful public library in or near M. The executors have all died without nominating any associates, testator's sisters are both dead, and a legal organization in M. has established a public library. On application of the heir at common law of the last surviving executor—*Held*, that he would be directed to sell the premises in M., including a wharf two hundred yards distant from "the Cottage," but bought solely for the use of, and always used by the testator solely in connection therewith, and to pay over the proceeds to the library already existing at M., as trustee; and, further, that the executor's failure to designate a co-executor would not destroy the charity. *Brown v. Pancoast*, 321

Comity.

1. Judgments of courts of record in one state are entitled to recogni-

- tion by the courts of sister states as evidence of a debt, but they have no extra-territorial force as judgments. *Elizabethton Savings Institution v. Gerber*, 130
2. A transfer of title, by operation of law, can only be effected within the limits of the territory where the law prevails; and, as the laws of a state have no extra-territorial force, it follows that the title to property located in one state cannot be passed by force of the laws of another, except in virtue of the comity or courtesy which prevails among different nations and states by force of international law. *Receiver of the State Bank v. First National Bank of Plainfield*, 450
3. No state is bound to give effect to the law of a foreign state when to do so will prejudice either the rights of its citizens or the interests of the state; but where a transfer of property is valid by the *lex loci*, no just rule of comity requires the courts of the state where the property happens to be located, to adjudge such transfer to be invalid at the instance of citizens of other states, simply on the ground that it is incompatible with its laws. *Id.*, 450
- See CHARITY, 2.

Constitution.

1. The construction of a horse railroad in a public street, is a legitimate use of the street, and not a taking of private property for public use, within the meaning of the constitution. *West Jersey R. Co. v. Cape May R. R. Co.*, 164
2. Appeal from orphans court. *Mount v. Van Ness*, 512

Contract.

1. Construction of a contract by which complainant was to receive a certain percentage on the contract price for building a railroad. *Osborne v. O'Reilly*, 60
2. After the appointment of a receiver of an insolvent corporation by this court, and proceedings in foreclosure, an agreement among the secured and general creditors of the corporation, was entered into, whereby certain income bonds were to be issued, "payable in thirty years, with interest at seven per cent., payable half-yearly," and the interest was to be paid, if the company should "be able to pay it by its income, after paying claims prior thereto, within the year," and the annual interest should not be allowed to accumulate. A committee to arrange the details of the plan was appointed.—*Held*, that the committee had authority to consent that the bonds should be made payable, at the option of the company, on or before the expiration of thirty years from the date of their issue; and held, also, that the receiver would not be ordered to pay the interest on the bonds while the floating debt of the company remained unpaid. *Lehigh Coal and Navigation Co. v. Central R. R. Co.*, 88

See MUNICIPAL CORPORATION, 2.

Corporation.

1. That a board of directors of a company incorporated in this state, held its meetings out of the state, does not affect its title to lands acquired here. *Parsons v. Lent*, 60
 2. The legality of a corporation, which exists under the form of law, can only be impugned by an application for a writ of *quo warranto*, or by an information in the nature thereof, instituted by the attorney-general. *West Jersey R. R. Co. v. Cape May and Schellenger's Landing R. R. Co.*, 164
 3. The managers of a building and loan association are not personally liable for losses resulting from an honest mistake in estimating the value of stockholders' lands on which they loaned money, nor for a defect in the acknowledgment of a mortgage, which rendered it worthless. But they are liable for losses from loans made on personal security of the stockholders, in violation of a by-law limiting the amount of such loans. *Citizens Building Assn. v. Coriell*, 383
 4. The treasurer of a savings bank, who was also one of its managers, assigned to the bank a bond and mortgage owned by him on lands not worth double the mortgage, as required by the bank's charter, and without submitting the investment to the finance committee for approval, as required by its by-laws.—*Held*, that he was liable for a loss sustained on such bond and mortgage, and that the fact that the managers did not object to or repudiate the transaction for six years, was no defence, whether his breach of duty was known or not known by the other managers. *Williams v. Riley*, 398
- See ACCIDENT, 4; BANK, 1; DEED, 3; EMINENT DOMAIN, 1; GIFT, 1; MORTGAGE, 6.

Costs.

1. Where defendants, in good faith, sever in their answers, each one may be allowed his costs, although they all may have employed the same solicitor. *Putnam v. Clark*, 51
2. The claim that the dismissal of complainant's suit ought to be made without the payment of costs, on the ground of the novelty of the decision in the defendants' suit, cannot be allowed, that decision having been, in fact, based on a long-established construction of defendants' charter. *McFarlan v. Morris Canal Co.*, 369
3. If a defendant, after he has notice that the complainant is non-resident, takes any step in the cause, as, for example, if he asks for the continuance of an interlocutory motion, and afterwards proceeds to hearing on it, without objection, and procures its denial, he waives his right to security for costs. *Shuttleworth v. Dunlop*, 488

Creditor's Bill.

1. Upon a judgment recovered in Pennsylvania an attachment was issued out of the supreme court of New Jersey, to reach defendant's interest in certain lands in this state.—*Held*, that a creditor's bill to set aside defendant's conveyance of those lands to his brother, shortly before the action in Pennsylvania was begun, was sustainable under the lien of the attachment, and that the insolvency of the defendant was not a material fact, or necessary to be proved. *Smith v. Muirheid*, 2
- See* INJUNCTION, 2.

Custom.

1. The first requisite of a good custom is that it shall have been used so long that the memory of man runneth not to the contrary; customs, therefore, like those of gavelkind and borough-English, cannot prevail here, for they cannot have the requisite antiquity to give them validity. *Ocean Beach Assn. v. Brinley*, 438

D**Dedication.**

See MORTGAGE, 16.

Deed.

1. If the description in the deed calls for "more or less," and the quantity falls short or overruns a little, compensation will not be allowed, in the absence of fraud. *Melick v. Dayton*, 245
2. Mere enumeration of quantity at the end of a particular description of the premises, where there is no fraud or gross mistake, is matter of description only, and not of the essence of the contract, and in such case there will not be deduction from the mortgage. *Id.*, 245
3. From a deed of lands conveyed by the defendant to complainants, a strip was excepted "for a public road or turnpike and for no other use," and was so described in a map of the premises filed in the county clerk's office at that time. A turnpike road was built on it. The defendants afterward encroached on the strip by erecting buildings &c. thereon. On bill for an injunction to prevent the turnpike company from removing such encroachments—*Held*, that it constituted no ground for relief that there were informalities in the organization of the turnpike company, nor that the turnpike company had not, by legislative grant, obtained the public easement over the strip—the turnpike having been built and large sums of money spent thereon with complainants' knowledge and acquiescence; nor that the taking of tolls thereon was suspended when the encroachments were made, such suspension being merely temporary on account of the destruction of a bridge at the terminus of the turnpike. *Shippen v. Paul*, 314

Deed—Continued.

4. Where lands are conveyed by deed of bargain and sale simply, which ordinarily operates only to transfer vested interests, but it distinctly appears on the face of the deed that it was intended to transfer any future interest which the grantor might acquire, equity will treat the deed as an executory agreement to convey, and compel the grantor to convey the subsequently acquired interest. *Hannon v. Christopher*, 459
See ACCIDENT, 4; ESTOPPEL, 7; EVIDENCE, 1.

Desertion

See DIVORCE, 1, 4.

Devise and Legacy.

1. A testator divided his estate into four shares, gave one share to each of his three daughters, and directed his executors to invest the fourth share, and to pay the interest thereon to his son for life, and at his son's death, to pay the principal of that share to his three daughters, "or their heirs," equally; and "in case of the death of any of my said daughters before my decease, or before the death of my son, or before receiving her bequest, leaving lawful issue, such issue is to take the bequest or share to which his, her or their mother would be entitled, if living." One daughter died testate, after the testator, but before actually receiving her share, leaving lawful issue.—*Held*, that her share vested in her at the testator's death, and was payable to her executors, and not to her issue. *Joseph v. Utitz*, 1
2. A testator gave the use of a farm to his two daughters, S. and K., for life, S. to have two-thirds of the income and K. one-third, "and after the decease of my two daughters," to their children in fee, in specified portions. S. died, leaving children.—*Held*, that K. is entitled to only one-third of the income, and the remaindermen to the other two-thirds. *Woolston v. Beck*, 74
3. A testator directed his executors to invest a fund and to pay to his widow, for life or widowhood, one-third of the interest thereof, and to his children and grandchildren, whom he named, the remaining interest in designated portions; that if any such child or grandchild should die without issue, the survivors should take such decedent's share in like portions; that, if any of them should die leaving lawful issue over twenty-one years of age, the executors should pay to the representatives of such decedent the principal on which such decedent had received the interest. One child died during the lifetime of the widow, leaving a daughter over twenty-one.—*Held*, that the executors could pay her the principal of her share on her producing the widow's release of her interest therein. *Valentine v. Smith*, 209

Devise and Legacy—Continued.

4. A devise to three persons, "to the survivor of them, and to the heirs and assigns of such survivor," creates a joint estate for life in the three, with contingent remainder in fee to the survivor. *Hannon v. Christopher*, 459
See CHARITY, 1; EXECUTORS, 6; TRUSTS, 7.

Divorce.

1. Where a husband and wife have never lived together, and the wife evinces a strong disinclination to live with her husband at all, and repulses his advances towards a reconciliation, their consequent separation held not to be desertion within the divorce act. *Reece v. Reece*, 32
2. In order to give jurisdiction, the divorce act requires that the parties, or one of them, must have been an inhabitant of this state at the time of the injury, desertion or neglect complained of, &c.—*Held*, that an incurable impotence, existing at the time of the marriage, was a *continuing* injury and gave jurisdiction, although neither of the parties was an inhabitant of the state when the marriage was contracted. *A. B. v. C. B.*, 43
3. The parties were married in 1865, and the defendant (the wife) successfully resisted all efforts for intercourse for about five years. Some time afterwards her impotence was discovered, and complainant induced her to submit to a surgical operation therefor, which was performed in 1877, but without success. In 1879 complainant became satisfied that defendant was incurably impotent, and in 1880 filed a bill for divorce on that ground.—*Held*, that his claim to relief had not been forfeited by delay. *Id.*, 43
4. Although a wife leaves her husband's house through his fault, yet if he afterwards sincerely solicits her to return and she deliberately and persistently refuses to do so, her conduct constitutes desertion within the meaning of the divorce act. *Hooper v. Hooper*, 93
5. A husband, who treated his wife with extreme cruelty and drove her from his house under a menace that he would kill her if she did not go, and threatened to have a constable put her out of his house when she returned and applied to him for support, was required to give security for the maintenance of his wife and child, a boy five years of age, notwithstanding his allegation and oath that he expelled her because he detected her in adultery, his testimony on the subject not being corroborated, but, on the other hand, being overborne by that of the wife and her alleged paramour. *Maas v. Maas*, 113

Dower.

1. Dower, when founded on a legal seizin, is a pure legal right, and

Dower—Continued.

- while courts of equity have concurrent jurisdiction with courts of law of suits for dower, yet, when no equitable principle is involved, they govern themselves by the same rules which control courts of law. *Ocean Beach Assn. v. Brinley*, 438
2. In such cases, a court of equity will not try a question of legal title: if the dowress comes to equity, in the first instance, for a remedy, and the defendant denies her legal right, equity will defer giving her relief until the question of title is determined at law. *Id.*, 438
 3. If A agrees with B to purchase land for him, and have it conveyed to him, so that A is not the vendor, but a mere intermediary between the vendor and B, and A afterwards takes title in his own name, he will hold the land as trustee of B, and A's widow will not, in equity, be entitled to dower. *Id.*, 438
 4. But, in such case, B can only defend successfully by resorting to the aid of a court of equity. *Id.*, 488

E.**Easement.**

See CONSTITUTION, 1; DEED, 3.

Eminent Domain.

1. In 1870, the defendants, in consideration that the Montclair Railroad Company would construct a depot on the premises, and stop a specified number of daily trains there for ten years, and build the fences along the track, agreed in writing to convey to the company the lands necessary for their track and depot. The company took possession at once, and built their track but nothing more. In 1875, under the foreclosure of a mortgage, all of the Montclair company's property was sold, and a new company organized. In 1878, under a foreclosure against the latter company, all of their property was sold, and another company, the complainants, formed. After the complainants had been incorporated, the defendants began an ejectment at law to recover their lands, and this action was enjoined by complainants and relief in equity sought. The defendants answered, protesting against the specific performance of their contract, and expressing willingness to convey the premises to complainants, on receiving compensation therefor and damages assessed as of the date when the Montclair company took possession.—*Held*, that they were equitably entitled to have their compensation and damages so estimated. *New York and Greenwood Lake R. R. Co. v. Stanley*, 55

See CONSTITUTION, 1.

Equitable Conversion.

1. A non-resident monomaniac was made a party to proceedings in partition. She had never been declared a lunatic, and a guardian *ad litem* was appointed to protect her interests in the suit. The premises were sold, and her share of the proceeds paid into court in 1871. From 1871 to 1878 she was confined in an insane asylum in Pennsylvania, but from 1878 until her death in 1880, she lived at her own home in that state. She frequently declared her intention of obtaining the money paid into court as her share, but died without having done so.—*Held*, that the fund, including the accrued interest, was personalty, and payable to her administrator. *Smith v. Bayright*, 424

Estoppel.

1. In 1860, complainant made a verbal agreement with his brother John to buy a part of a tract of land on which John then lived. He paid the purchase-money, entered into possession, and erected thereon a dwelling-house, in which he has ever since resided. John continued to live on the other part of the land. In 1873, John gave three mortgages covering the entire tract. In 1877, the first mortgage was foreclosed, and the whole tract bought thereunder by the holder of the other two mortgages. In 1875, complainant had a survey of his part of the tract made, and also a search of the records, whereby he discovered the existence of the mortgages; he also knew of the subsequent advertisement of the premises for sale under the foreclosure, and consulted counsel in regard to it, but took no steps to protect his claim, not even giving notice of it at the sheriff's sale.—*Held*, that his silence estopped him from setting up any claim to relief against the purchaser at the foreclosure sale. *Collier v. Pfennig*, 22
2. A mortgagor may, by concealing his equities, or misleading the assignee, place himself in a position where justice will be defeated if he is allowed to set up, against the assignee, an equity on which he would be entitled to prevail in a suit by his mortgagee. Where the conduct of a mortgagor leads to such a result, courts of equity hold that he is estopped. *Woodruff v. Morristown Inst. for Savings*, 174
3. Where one person, by either words or conduct, induces another to believe that he may safely purchase certain property, or take a certain security, and he subsequently, relying on such representation, acquires the property or security, the former will never be permitted, in a court of equity, to overthrow the title so acquired. *Id.*, 174
4. The claims of certain creditors of a decedent to share the proceeds of the sale of his lands to pay debts, were rejected, because they

Estoppel—Continued.

- were not presented under oath. An order was made, distributing to the widow and children the surplus remaining after the payment of the debts which had been regularly proved. Afterwards, a suit in chancery was begun by some of the creditors whose claims had been rejected, and the administrator enjoined from paying over the surplus to the widow and children. The chancery suit was subsequently compromised by the widow, on her own behalf, and as the guardian of the children, agreeing to the payment of part of the creditor's claims out of the surplus, and a release therefor was given to the administrator. On a petition by the widow to the orphans court for an order to compel the administrator to comply with the original order of distribution of the surplus—*Held*, that the release was conclusive on the orphans court, and the widow estopped thereby. *Robbins v. Mylin*, 205
5. The doctrine of title by an estoppel binding the second mortgagee, cannot be invoked in this case by B., inasmuch as T. H. already had title when he gave the mortgage to B., and the second deed to T. H. was nugatory. *Bingham v. Kirkland*, 229
6. On November 22d, 1875, an administrator gave the usual notice to bar creditors in nine months, but the order thereon was not taken until May 29th, 1877. The complainant and two other creditors exhibited their claims within the nine months specified, and all the other creditors, except two, before the order was taken. The estate proving insolvent, the administrator, under the advice of the surrogate and also of his counsel, proceeded, with a view to saving trouble and expense, to settle the estate as if it were solvent, that is, by paying to each creditor his *pro rata* share of the assets, and settled the estate accordingly. The complainant, on receiving his dividend, gave the defendant a receipt in full for his claim against the estate. Both the administrator and the complainant were, at that time, ignorant that the latter had, by presenting his claim within the nine months, obtained a preference as to payment over some of the other creditors.—*Held*, that complainant, who did not assert the priority of his claim, allowed the administrator to pay all the creditors without a protest, and accepted his own dividend, and voluntarily gave the administrator a receipt in full for his claim against the estate, was not, under the circumstances, entitled to relief in equity. *Miller v. Harrison*, 374
7. Whether a contingent or an after-acquired interest will pass by estoppel, as the result of a conveyance by deed of bargain and sale, without covenants, depends upon whether it was the intention of the parties to convey it; and whenever it clearly appears that such was their intention, it is the duty of the court to adjudge an estoppel, in order that the deed may be carried into

Estoppel—*Continued.*

- effect, according to the minds of the parties. *Hannon v. Christopher*, 459
8. Whether the appearance of the truth on the face of the instrument will defeat an estoppel or not, must depend upon the fact whether it is so expressed that it can be readily seen and understood by the person who ought to be influenced by it, or in manner so technical or obscure that it was not seen nor understood by such person, who dealt with the party sought to be estopped, as though the words on which the estoppel is founded expressed the whole truth. *Id.*, 459
9. A complainant, being excluded as a witness in the proceeding in equity, because one of the adverse parties stands before the court in a representative capacity, cannot retry the same issue in a court of law, after an adverse decree in the chancery suit. *Putnam v. Clark*,
10. The fact that she can be a witness in the second suit, and could not in the first, will not give such right. *Id.*,
11. The doctrine of *res judicata* discussed. *Id.*,
See CORPORATION, 4; DEED, 3; TRUSTS, 6.

Evidence.

1. Where the evidence as to the delivery of a deed is connecting, the fact that the deed itself is discovered among the papers of the grantee's solicitor is important. *Laing v. Byrne*, 52
2. A master may erase from his record of the evidence his note of the objection to the competency of a witness, and insert it elsewhere, so as to make a true record of the time when the objection was interposed. *Id.*, 52
3. A witness cannot, without leave of the court, be re-examined on a matter as to which he has been previously examined; but the ground of objection must be specifically stated when he is recalled, or his testimony will not be excluded. The rule, however, does not prevent the recalling of a witness in rebuttal. *Osborne v. O'Reilly*, 60
4. A receipt is never conclusive evidence of payment, but is always open to explanation or contradiction by oral evidence. *Wildrick v. Swain*, 167
5. On exceptions to an executor's account, the executor is not a competent witness, when he offers himself as a witness on his own behalf, to testify as to any transaction between himself and his testator. *Smith v. Burnet*, 219
6. Complainant's testimony is not competent to disprove allegations in an answer, where the answer itself, although in one sense responsive, is not evidence; nor can she, under *P. L. of 1880 p.*

Evidence—Continued.

52, testify as to transactions with her husband, either by general or detailed statements. *Clawson v. Riley*, 348

See DIVORCE, 5; ESTOPPEL, 9, 10; EXECUTORS, 16; FRAUDS AND PERJURIES, 1; GIFT, 1; LUNATICS, 1.

Executors and Administrators.

1. A mortgagee died in 1877, leaving, besides the mortgage, but little personal property, which was shortly afterwards divided among her next of kin. In September, 1879, the mortgaged premises were sold by their owner, and the amount of the mortgage paid to the mortgagee's next of kin, one of whom then produced the mortgage, and it was canceled of record. In October, 1879, one of the mortgagee's creditors took out letters of administration on her estate.—*Held*, that the payment of the money due on the mortgage to the next of kin, and its cancellation of record, were invalid, and the latter was set aside on the administrator's application. *Woodruff v. Mutschler*, 33
2. A claim against the estate of a decedent on his assumption of a mortgage, is, before foreclosure, only contingent, and consequently cannot be proved as a debt against his estate before that time. *Terhune v. White*, 98
3. There must be a *decree* of the orphans court, or creditors' claims, although not presented within the prescribed time, are not barred. *Id.*, 98
4. Upon an application to assess the damages on a judgment recovered against an administrator and his sureties, because of his failure to apply to the payment of the intestate's debts the proceeds of lands sold under an order of the orphans court—*Held*,
 - (1) That since the only question to be now determined is the amount to be raised, the further question whether the administrator *de bonis non* is entitled thereto, is premature.
 - (2) That as the administrator had authority to sell only the lands specified in the order of the orphans court, his sureties are not liable for the proceeds of sale of any other lands.
 - (3) That there can be no deduction in the administrator's favor because of his failure to exhaust the personal estate of the intestate in payment of his debts, before applying the proceeds of the realty thereto. *Givens's Case*, 191
5. The 118th and 119th sections of the orphans court act (*Rev. 778*) are intended to protect the estates of decedents from misapplication or waste by executors &c., and being remedial, must be liberally construed. *Perrine v. Petty*, 193
6. A legacy was given to an infant to be put out on bond and mortgage, and to be paid when the infant attained the age of twenty-one years, with interest accruing thereon. *Held*, that it was the

Executors and Administrators—Continued.

- duty of the executors to compound the interest as it accrued, by investing it as soon as practicable thereafter. *Id.*, 193
7. An executor who, without authority, lends such a fund to his co-executor, on inadequate security, is liable for the amount of the principal and compound interest; and the fact that such investment has been stated in his account in the orphans court will not exonerate him. *Id.*, 193
8. The true test in considering the sufficiency of the security for a trust fund, is the price which the property would bring at a forced sale. *Id.*, 193
9. One of two executors collected a large amount of money due the estate, without his co-executor's knowledge, and in order to secure the estate, gave a mortgage on his own lands, payable to himself and his co-executor. The property covered by the mortgage was sold under a prior mortgage, and nothing realized therefrom for the estate.—*Held*, that the delinquent executor was not, by giving the mortgage, exonerated from liability to his co-executor. *Storrs v. Quackenbush*, 201
10. In 1861, under the directions of a will, A and B, the executors thereof invested \$4,000 in a mortgage, to pay the interest to C until C's son arrived at twenty-one, and then to pay the principal to him. The mortgage was taken in the name of both the executors. A borrowed moneys at various times afterwards, of the mortgagor, on his own account, and, in September, 1875, credited the mortgagor, on the mortgage, with \$1,000, on account of those borrowed moneys. In February, 1878, B ascertained these facts, and inquired of A in regard to them, but took no further steps. C's son attained his majority in October, 1878.—*Held*, that B was liable for the \$1,000, A being insolvent; and that it was no ground of relief that the mortgage had, for convenience in collecting the interest, been left in A's hands, or that A's malfeasance had not been discovered until two years thereafter, and that A was said to have been then insolvent, nor that A had voluntarily accounted alone in the orphans court, in 1875, for his administration of the fund, B having omitted to take the steps precautionary and protective, which he might have taken in behalf of the trust estate in the premises. *Smith v. Pettigrew*, 216
11. The provisions of the statute on the subject of commissions of administrators, executors &c., and the duty of the court thereunder, considered. The fees of the administrator of a very large estate fixed, and the reasons stated. Allowance for the compensation of an accountant employed by the administrator to keep and make up his account, refused. *Wolfe's Case*, 223
12. Upon the removal of an executor, it is his duty immediately to deliver to the administrator with the will annexed, appointed in

Executors and Administrators—Continued.

- his stead, all goods and chattels, moneys and effects, in his hands, belonging to the estate. *Aldridge v. McClelland*, 237
13. That part of the 130th section of the orphans court act, which directs that the removed executor shall settle his account at the next term of the court, and pay over the balance to his successor within sixty days, is not inconsistent with that part of the same section, which directs that he shall, immediately after removal, deliver the moneys then in his hands. *Id.*, 237
14. The object of the statute is at once to get all the property of the estate out of the hands of the removed executor, and transfer it to his successor, who has given bond, and this applies to moneys which it is ascertained by his admission, or otherwise, he holds. *Id.*, 237
15. Should it happen that, on final settlement, there be money required to pay debts or costs of settlement, the administrator with the will annexed will be ordered by the orphans court to pay the same. *Id.*, 237
16. C. was the administrator of his wife's father, sole acting executor of her brother, and sole executor of her mother, and complainant (C.'s wife) had an interest in each of those estates. On bill filed after her husband's death, against his executors to recover her several unpaid shares—*Held*,
- (1) That they must account for the principal and interest of securities, standing in C.'s name, which were taken by the complainant as part of her father's estate, and which C., instead of assigning them to her, caused to be assigned to himself.
- (2) That complainant's receipts for payments on account of her shares, given to C. at different times, are conclusive as against her unsupported testimony, if it were competent (but, under the circumstances, it is not), denying the several payments, because they show that, if the payments were never in fact made, she voluntarily discharged C. therefrom. *Clawson v. Riley*, 348
17. A testator gave the use of all his estate to his widow for life, and gave to complainant, among others, a pecuniary legacy, payable after the widow's death. He appointed his widow and another person executors, and they are both dead. Administrators *cum testamento annexo* were appointed, and in a suit in this court against the widow's executor he was ordered to pay them certain moneys and to deliver certain securities, and they were also ordered to settle their final account in the orphans court. They have done nothing whatever, owing to disagreements among themselves.—*Held*, that, while this court could not remove them, it could compel them to account here, with a view to the payment of complainant's legacy, and to execute the other trusts of the will. *Newman v. Warner*, 359

Executors and Administrators—Continued.

18. A creditor of a decedent who presents his claims at any time before the decree of the orphans court barring creditors is actually taken, is in time, although the nine months limited in the order may have expired. *Parker v. Combs*, 522
- See CHARITY, 3; EQUITABLE CONVERSION, 1; ESTOPPEL, 4-6; EVIDENCE, 5; FRAUDS AND PERJURIES, 1; HUSBAND AND WIFE, 1.

F.**Fraud.**

1. Where a debtor has attempted to discharge a mortgage with his own unsecured paper promise, given to a person of great age and limited education, he should be required to exercise the most scrupulous good faith, and unless he can show that his creditor fully comprehended the legal effect of the acquittance he induced him to give, it should be adjudged to be without legal force. *Wildrick v. Swain*, 167
- See ACCIDENT, 1; ESTOPPEL, 2; MORTGAGE, 14; SPECIFIC PERFORMANCE, 1.

Frauds and Perjuries.

1. Two owners of lands agreed by parol that the property should be considered and conducted as partnership property, each owner contributing equally to the support of a widow, whose support for life was a charge on the lands, and to the expenses and taxes; that an account should be kept of the proceeds derived from the sale of the produce and from the sale of any sand therefrom; that one owner might live on the land, and any advancements for her support should be charged against her, and at the death of either, a final account should be taken. On a bill for such an account filed by the administrator of one owner, after the widow's death—*Held*, that it was no ground for demurrer—
- (1) That the agreement was by parol.
- (2) That the administrator sues in a representative capacity, and requires the defendant to testify in regard to transactions with the intestate.
- (3) That the intestate's account of his advances and payments has been exhibited to her, and its correctness admitted by her, and hence complainant might have a remedy at law. *Personette v. Pryme*, 26
- See MORTGAGE, 2; RELIEF AGAINST JUDGMENTS, 1.

Fraudulent Conveyances.

1. Moneys given by a married woman to her husband in 1855, and for which she received no evidence or security until 1877, when he had become insolvent—*Held*, not to sustain, under the circum-

Fraudulent Conveyances—Continued.

- stances, as against his existing creditors, a transfer of property to her in 1877, but as to them to be fraudulent. *Luers v. Brunjes*, 19
2. Where a fund was to be invested during the lifetime of a widow, and then to be paid over to a remainderman—*Held*, that a remainderman is, as to his share of the fund, to be regarded as a creditor as against whose claim therefor a voluntary conveyance of lands may be set aside, although made during the lifetime of the tenant for life. *Soden v. Soden*, 115
3. If a sale is shown to have been fair and honest when made, and that no fraudulent purpose then existed, it cannot be overthrown by subsequent acts or purposes. *Creveling v. Fritts*, 134
4. A voluntary deed made by a grantor who is indebted at the time of its execution, is void as to creditors whose claims then exist. A conclusive presumption of fraud arises from the mere fact that debts exist and the deed is voluntary. *City National Bank v. Hamilton*, 158
5. A voluntary deed may be void as to creditors whose claims are contracted subsequent to its execution. If the grantor of such a deed executes it in the expectation of shortly contracting debts, and with the design of so placing the property conveyed that if misfortune afterwards befall him, and he becomes unable to pay his debts, it shall be beyond the reach of his creditors, the deed will be held void on the ground of fraud. *Id.*, 158
6. If a wife permits her husband to take title to her lands, and to hold himself out to the world as the owner of them, and to contract debts upon the credit of such ownership, she cannot afterwards, by taking title to herself, withdraw them from the reach of his creditors, and thus defeat their claims. *Id.*, 158
7. No one can be permitted to found a claim or defence on an allegation that he has attempted to cheat his creditors. *Holt v. Creamer*, 181
8. If a mortgage be given with the fraudulent intent to cover and conceal from the mortgagor's creditors a part of his property, although, as to another part of his property, it is meant to be an actual security for an honest debt, as to creditors it will be altogether void. *Id.*, 181
9. A mortgagee, to be able successfully to resist the impeachment of his security, must appear to be not only a mortgagee for value, but a mortgagee in good faith. If it appears that his mortgagor executed the mortgage for a fraudulent purpose, and that he knew of such purpose, and took the mortgage to aid him in its execution, his mortgage is void against those who are defrauded by it, even if it is founded on a perfect consideration. *Id.*, 181

Fraudulent Conveyances—Continued.

10. The fact that a mortgagee knows that his debtor is trying to magnify his liabilities, and wants him to take a mortgage for a sum so large that if his creditors should regard it as an honest security, his lands would be effectually put beyond their reach, makes it his duty to inquire as to his debtor's object and purpose, and a failure to do so constitutes a fraud. Fraud may be passive as well as active. *Id.*, 181
11. A debtor possesses the right, even when in insolvent circumstances, of giving one or more of his creditors preference over the others; but it must always be exercised for honest ends and according to legal methods. *Livermore v. McNair*, 478
12. A creditor has a right to have his debtor's property applied to the discharge of his debts by due course of law, and any disposition which the debtor may attempt to make that has the effect to defeat this right, is a fraud against the creditor. *Id.*, 478
13. A executed a mortgage to three of his creditors, to secure notes made to them and some other of his creditors, payable in installments, in one, two, three, four and five years. A also confessed judgment to one of his creditors, under which his personal property was sold, and bought by one of his said three creditors, and transferred by him to the wife of A, upon her executing a chattel mortgage for the full amount of the purchase-money. The object of the mortgage and judgment, as stated by A, was to prevent the sale of his property, so that he might, from its advance in value and the profits of his business, be able to pay all his creditors in full.—*Held*, that the mortgage and judgment were in contravention of both the statute regulating assignments and the statute of frauds. *Id.*, 478
14. If a mortgage, given to secure a debt actually due, be drawn for a larger sum, with intent, on the part of both mortgagor and mortgagee, to delay, hinder or defraud the creditors of the mortgagor thereby, it will be adjudged void at the instance of those creditors, and will not be allowed to stand against them, even as security for the real debt. *Heintze v. Bentley*, 562
15. A mortgage, drawn for \$7,000, was accepted by the mortgagee as security for a real debt of \$1,300, without any purpose on his part to delay, hinder or defraud the creditors of the mortgagor. Afterwards the mortgaged premises were sold by the sheriff under an execution upon a judgment prior to the mortgage, and parties holding judgments subsequent to the mortgage refrained from bidding at the sale, under the belief that the mortgage debt was \$7,000, and so would absorb all the surplus proceeds of a fair price, and the mortgagee became the purchaser. It also appeared that if these parties had known the truth, they would have bid such a price as would have realized something on their

Fraudulent Conveyances—Continued.

judgments.—*Held*, that at their instance the sale must be set aside, even though the mortgagee had, in the meantime, conveyed the premises to the wife of the mortgagor, receiving her bond and mortgage for the purchase-money. *Id.*,

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See HUSBAND AND WIFE, 3; INJUNCTION, 2.

**G.****Gift.**

1. Where stock stood in a testator's name on the books of the corporation, the facts that the certificate is found in the executor's possession, and that the testator gave him a power of attorney to receive and assign any scrip or dividend due him from the company, are not conclusive evidence of a gift of the stock to the executor. *Smith v. Burnet*,

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See HUSBAND AND WIFE, 3; UNDUE INFLUENCE, 1, 2.

Guardian.

1. The right of sureties to be relieved from responsibility for the future acts or defaults of administrators or guardians is absolute, and, on a proper application, must be granted. Where, however, the sureties do not appear on the day set by the court for the hearing, their application may be treated as abandoned, and may be dismissed. *Allen v. Sanders*,

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H.**Husband and Wife.**

1. A covenant contained in a deed of jointure provided that the husband should invest his wife's separate estate, and account to her for the income and for the rents of her real estate. After the marriage he received all of her personal property and invested it, but never accounted for nor paid to her the income thereof, nor the rents of her real estate, which he also received.—*Held*, that his representative was, after his decease, liable to account to her therefor, with interest to be calculated with yearly rests. *Middaugh v. Trimmer*,
2. By the common law, a husband had an absolute right to all moneys earned by his wife; but this rule has been abrogated in this state. *Rev. 637 § 4. Tresch v. Wirtz*,
3. Prior to this statute, a husband could make a valid gift or relinquishment to his wife of her earnings, even against creditors whose debts had already been contracted. *Id.*,
4. If a wife places money in her husband's hands, to be invested for her, and he accepts it with that understanding, he becomes her trustee, and is bound to execute his trust faithfully. *Id.*,
5. The marital relation does not disqualify a husband from becoming the agent of his wife. *I*

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Husband and Wife—Continued.

See DIVORCE, 1-5; EVIDENCE, 6; FRAUDULENT CONVEYANCES, 1, 6;
MORTGAGE, 1, 7; TRUSTS, 5.

I.

Injunction.

1. An allegation in a bill that the defendant, by virtue of a judgment and execution at law against complainant's grantor, has seized upon and is about to sell lands to which complainant has the legal title, presents no equitable ground for enjoining such sale. *Sheldon v. Stokes*, 87
2. A creditor's bill was filed to set aside as fraudulent a conveyance of lands, about one-half of which was woodland.—*Held*, that an injunction which restrained the grantee from cutting and removing the wood from the premises, would not be continued, it appearing that the value of the land, without the wood, was ample to satisfy the creditor's claim, in case the conveyance should ultimately be annulled. *Portland Building Assn. v. Creamer*, 107
3. The fact that the right of the complainant depends on an unsettled question of law, is always fatal to an application for a preliminary injunction. *West Jersey R. R. Co. v. Cape May R. R. Co.*, 164
4. It is a maxim of the law of injunctions that a preliminary writ shall not be awarded, except in case of urgent necessity, and when irreparable injury is threatened. *Id.*, 164
5. Where the averments of the bill are met by a full, explicit and circumstantial denial in the answer, the general rule directs that a preliminary injunction shall be refused. *Id.*, 164
- 6 Upon an original bill filed by an attachment creditor, a sheriff was enjoined from paying over certain funds in his hands. The court, *ex mero motu*, ordered the injunction to be dissolved because the funds were not attachable, but, on appeal, this order was reversed. Motion to dissolve the injunction, on the ground that the verification of the bill (which was general) was insufficient, denied; it appearing that the averments of the bill as to the service of the attachment, are not denied by the answer, and that the validity of the attachment is shown to the court by subsequent satisfactory proof as to the service, inventory and return of the writ, and also by the allegations of the supplemental bill duly verified, and the admissions of the defendant in his amended answer. The question of the sufficiency of the attachment (the writ was served on the sheriff twice on the same day, before and after the funds came into his hands), reserved until the final hearing. An amendment to the answer, denying that the attachment created a lien, allowed, it appearing that defendant's coun-

Injunction—Continued.

sel, on account of the first order determining that the funds were not attachable, had deemed such an averment unnecessary.
Conover v. Ruckman,

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7. Relief by injunction to restrain a business in itself lawful, is not a matter of right, but rests in discretion. If the legal right is not clear, or the injury is doubtful, eventual or contingent, equity will give no aid. *Demarest v. Hardham,*

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8. If the fact of an actionable nuisance is established, the court is bound to compare consequences, and if it appears doubtful whether greater injury will not be done by granting than by withholding the injunction, it is the duty of the court to decline to interfere. *Id.,*

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See DEED, 3.

Insanity.

See LUNATICS, 2, 3; WILLS, 1.

Insolvency.

See ASSIGNMENT FOR CREDITORS, 1; BANK, 1; CREDITOR'S BILL, 1; PARTIES, 2.

Insurance.

1. Where one insured in a mutual company notified their agent that he had obtained other insurance on the premises, and the agent afterwards referring to the matter informed him that his insurance was all right—*Held*, that the company was bound by the notice and declaration of the agent. *Combs v. Shrewsbury Ins. Co.,*

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2. One of the additional policies having afterwards been canceled and another for the same amount written in another company, and the same agent, on inquiry by the insured, having stated that notice of such substitution was unnecessary—*Held*, that the company was bound by the notice to him. *Id.,*

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3. The partnership in whose name the policy was issued was dissolved before the fire, and the retiring partner's interest transferred to his copartner, who continued the business, and the company paid a dividend to him after such transfer.—*Held*, that they, by the payment, waived any objection they might have had on that score. *Id.,*

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See ACCIDENT, 1.

Interest.

See APPEAL, 1; CONTRACT, 2; EQUITABLE CONVERSION, 1; EXECUTORS, 6, 7; HUSBAND AND WIFE, 1; TRUSTEE, 1.

J.

Judicial Sales.

1. A resale of premises, sold under a foreclosure execution ordered, where one claiming an interest in the premises has, by neglect of her counsel, been deprived of an opportunity to protect that interest, and the property seems not to have produced the "highest and best price it would bring in cash at the time of the sale." (*P. L. of 1880 p. 255*). *Mutual Benefit Life Ins. Co. v. Gould*, 417
2. The act of 1880, which requires that foreclosure sales shall not be confirmed, unless the property has been sold at the best price it would bring, applies to all foreclosure sales, and not merely to those in which a personal decree for deficiency is sought. *Id.*, 417
3. Where the owner of the equity of redemption in mortgaged lands has assigned for the benefit of his creditors, he retains such an interest that he may apply to set aside a sale of the lands under foreclosure, notwithstanding the assignment. *Delaware, Lackawanna and Western R. R. Co. v. Scranton*, 429
4. In this case, he had made no defence to the foreclosure suit, and in his petition to set aside the sale, claimed, as one ground, that the mortgage was only collateral, and that the principal security for the debt had not been resorted to or exhausted.—*Held*, that that ground was not available to him under the circumstances. *Id.*, 429
5. The object of the fourth section of the act of 1880 (*P. L. of 1880 p. 255*), is merely to prevent the sacrifice of property at foreclosure sales, so far as it may be done by requiring proof, to the satisfaction of the court, that at the sale the property brought the best price then obtainable for it at a foreclosure sale for cash. The legislature did not intend by it to authorize the court to protect the property from sacrifice by setting aside sales until an adequate price should be obtained for it. *Id.*, 429

See ACCIDENT, 4; ESTOPPEL, 1; FRAUDULENT CONVEYANCES, 15.

Jurisdiction.

1. No court can enforce its process or orders beyond the limits of the state which ordained and established it. *Elizabethtown Sav. Inst. v. Gerber*, 130
2. Complainant's claim of damages for defendant's failure to perform his contract, cannot be sustained in equity. The remedy is at law. *Reilly v. Roberts*, 299
3. A bill against several defendants for a discovery, accounting and repayment of alleged unlawful overcharges for freight, the liability therefor being purely legal and enforceable at law, cannot be sustained, on the ground that one defendant is liable as the

Jurisdiction—Continued.

lessee of several short lines of railroad, and that the other defendants, the lessors, are also liable, and that if complainant be compelled to resort to law for redress, he must sue each defendant for a fractional part of each overcharge. *Scott v. Erie Railway Co.*, 354

See CHARITY, 2; COMITY, 1-3; CORPORATION, 2; DIVORCE, 2; DOWER, 1, 2, 4; EXECUTORS, 17; FRAUDS AND PERJURIES, 1; INJUNCTION, 3.

L.**Laches.**

See DIVORCE, 3; RELIEF AGAINST JUDGMENT, 1.

Landlord and Tenant.

1. In the absence of any agreement to the contrary, a tenant for years makes repairs at his own expense. *Heintze v. Bentley*, 562
See MORTGAGE, 2; RECEIVER, 1.

Lunatics.

1. An inquisition *de lunatico inquirendo* simply makes a *prima facie* case. *Hill v. Day*, 150
2. Where there is no reason to suspect fraud, the test, in cases where mental incapacity is charged, is, did the person whose act is challenged possess sufficient mind to understand, in a reasonable manner, the nature and effect of the act he was doing, or the business he was transacting? *Id.*, 150
3. A principal's insanity revokes the authority of his agent, except in cases where a consideration has previously been advanced, so that the power has become coupled with an interest; or where a consideration of value is given by a third person trusting to an apparent authority, and in ignorance of the principal's incapacity. *Id.*, 150
See EQUITABLE CONVERSION, 1; TRUST, 8; WILLS, 1.

M.**Maxims.**

1. The law will not permit a thing to be done by indirect means which it is not lawful to do by direct means. *Livermore v. McNair*, 478
2. Equity cares very little about mere matters of form; it endeavors to deal with the substance of affairs, and to regulate its judgment according to the real purposes which have controlled parties in the matters brought before it for relief or correction. *Id.*, 478

Maxims—Continued.

3. Common error sometimes passes as law, but no error can be raised to that dignity until it has been declared to be law by a judicial tribunal of superior jurisdiction, and is afterwards so far adopted as law, in practice, as to render a return to the true rule of law, destructive of existing interests. *Ocean Beach Assn. v. Brinley*, 438
4. Equity recognizes no rule as binding which will constrain it to do injustice. *Hannon v. Christopher*, 459
- Communis error facit jus*, 448
- Extra territorium jus dicenti, &c.*, 133
- Mobilia sequuntur personam*, 453
- Nemo debet bis vexari pro eadem causa*, 533
- Non dat qui non habet*, 234
- Sic utere tuo ut alienum non lædas*, 474
- Stat pro ratione voluntas*, 521
- Verba generalia, &c.*, 176

Mechanics' Lien.

See ACCIDENT, 3.

Merger.

1. B. held lands in trust for the benefit of a married woman. Afterwards, a mortgage on the same lands, given by his *cestui que trust* and her husband before the conveyance to him, was assigned to him on his paying it. He conveyed the lands, pursuant to the direction of his *cestui que trust*, subject to the mortgage, and assigned the mortgage at the same time to his grantee.—*Held*, that there was no merger of the mortgage in B.'s hands, and that judgments against him, recovered before his conveyance of the premises, were not liens thereon. *Denzler v. O'Keefe*, 361

Mortgage.

1. A married woman, in order to enable her husband to procure his portion of the capital of a partnership, gave a mortgage on her separate estate to her husband's partner, to be used for the purpose. He obtained the money from the complainant on an assignment of the mortgage.—*Held*, that an agreement between the partners and the mortgagor as to the payment of the mortgage out of the husband's profits of the firm's business, could not affect the title or interest of the complainant in the mortgage, he having had no notice of such agreement at the time of the assignment. *Ferdon v. Miller*, 10
2. A deed of lands accompanied by a lease thereof to the grantor, containing a clause for redeeming the lands, by paying a certain

Mortgage—Continued.

- amount within a specified time, is a mortgage, and not defeated by the grantor's failure to make a tender within the time limited, although the grantee took possession of the premises at the expiration of the lease. The time for making such tender may be extended by parol. *Vliet v. Young*, 15
3. Two purchase-money mortgages on the same premises were given and recorded simultaneously in September, 1859. One of them was payable in eight months, without interest, and was further secured by a surety on the bond. The other was payable in fifteen years, with interest. The surety paid his bond when it fell due, in May, 1860, but obtained no assignment of the mortgage until November, 1869, and did not record his assignment until November, 1875. The mortgagee assigned the other mortgage to B. in March, 1868, and that assignment was recorded the same month.—*Held*, that the mortgages were concurrent liens; the fact that one became due before the other giving it no priority. *Collier v. Huson*, 38
4. After five mortgages had been given on a tract of land, a small strip thereof was condemned and taken for a railroad track, and the owner paid therefor. The fourth and fifth mortgages, held by the bank, were subsequently foreclosed, the mortgagor being made the only defendant. At the foreclosure sale thereunder the bank bought the premises. Afterwards the second mortgage was foreclosed, making the railroad company a defendant, among others, and the bank came in and proved its mortgages.—*Held*, that the decree should order, first, the sale of all the land (excepting the strip condemned) to satisfy, in order, all five of the mortgages, and in case of a deficiency, then the sale of that strip. *Foster v. Union National Bank of Rahway*, 48
5. If a grantee who has assumed the payment of a mortgage reconveys the lands in good faith to his grantor, who in turn assumes it, the liability of the former to the holder of the mortgage is terminated. *Laing v. Byrne*, 52
6. Where a mortgagor gave a mortgage covering all of his interest in a corporation and in its lands—*Held*, that it was not a lien on lands then owned by him, and which he was under contract to convey, and afterwards conveyed accordingly to the corporation, superior to the title of the corporation, but only a lien on his interest in the company. *Parsons v. Lent*, 60
7. A married woman may, with her husband, mortgage her own lands to secure the payment of his debts or those of any other person, for the payment of which she is in no way liable. *Merchant v. Thompson*, 73
8. Since the act of 1880 (*P. L. of 1880 p. 255*), there can be no decree for deficiency in a foreclosure suit against the obligors in the

Mortgage—Continued.

- bond secured by the mortgage in suit. *Naar v. Union and Essex Laid Co.*, 111
9. In the construction of a release of a mortgage, the question is, not what did the parties mean to do, but what have they done by apt and proper words. *Woodruff v. Morristown Institution for Savings*, 174
10. Where a recital is followed by general words, the general words will be held to be limited or qualified by the recital. *Id.*, 174
11. It is an established rule that the assignee of a mortgage takes it subject to all the equities which the mortgagor may claim against it, but free from secret equities existing in favor of third persons. *Id.*, 174
12. The validity of a mortgage made in good faith, to secure future advances, is no longer open to question. *Holt v. Creamer*, 181
13. T. H. made a deed to L. H., in 1867, which was recorded. L. H. made a deed back to T. H., in 1868, which was never recorded. T. H. made a mortgage upon the same property to B., in 1871, which was recorded. Afterwards, L. H. made a second deed, purporting to convey again this property to T. H., in 1872. In 1874, T. H. made a mortgage to W. W. P.—*Held*, that the mortgage to W. W. P. was a superior encumbrance, the last mortgagee having no actual notice of the mortgage to B., or the deed to T. H., made in 1868. *Bingham v. Kirkland*, 229
14. The question of abatement from amount of mortgage, on account of deficiency in contents of the premises, may be raised by the mortgagor in foreclosure proceedings, by answer. *Dayton v. Melick*, 245
15. If a vendor fraudulently represents the number of acres, and thereby induces the vendee to pay more for the premises than he otherwise would, an abatement will be allowed. *Id.*, 245
16. There will also be abatement where there is gross mistake. *Id.*, 245
17. Lands covered by a mortgage were, in part, afterwards laid out by the mortgagor as a public street, and accepted and treated as such by the municipal authorities. Subsequently the mortgagee released that part of the mortgaged premises adjoining the street, and described it as bounding on the street.—*Held*, that the land lying in the street is, as against the mortgagee, subject to the public rights acquired by the dedication and release. *Vredand v. Torrey*, 312
18. A mortgage was given by a son to his father, in order, as the father testified, "to accommodate him financially—to do what he pleased with it."—*Held*, that an absolute assignment of it to complainant, to satisfy in part a former decree which he had obtained against the father, was not a misappropriation. *Wood v. Condit*, 434

Mortgage—Continued.

19. Since the statute of 1880 (*P. L. of 1880 p. 255*), a personal decree for deficiency cannot, on foreclosure, be obtained against a mortgagor. *Allen v. Allen*, 493
 20. The grantees of the mortgaged premises who assumed the payment of the mortgage in their respective deeds, are, nevertheless, still liable to the mortgagee on their several assumptions, if a deficiency remain after foreclosure, and their liability may be enforced through an independent suit in equity. *Id.*, 493
 21. A trust deed empowered the trustee to mortgage the lands thereby conveyed to such persons as the *cestui que trust* might designate in writing. The *cestui que trust* afterwards became indebted to the respondents for moneys paid by them for his use, on his checks and notes. Thereupon he requested the trustee in writing to execute a mortgage to the respondents to secure the payment of the notes or other commercial paper then or thereafter made or endorsed by him, and discounted by the respondents, not exceeding \$10,000 in amount. Under a subsequent written request, the trustee gave another mortgage on the same premises to appellant's testator.—*Held*, that, as against the appellant's mortgage, the respondents could recover the full amount of the *cestui que trust's* notes paid by them, whether discounted by them or not, except one not duly protested, and also all of his checks so paid, not exceeding, in the aggregate, \$10,000. *Jones v. State Banking Co.*, 543
 22. If a first mortgagee have knowledge of the existence of a second encumbrance on the estate, he will not be entitled to priority for subsequent advances, provided it was optional with him whether to make such advances or not. *Heintze v. Bentley*, 562
- See* ACCIDENT, 3; DEED, 2; ESTOPPEL, 2; EXECUTORS, 1, 2; JUDICIAL SALES, 1, 2, 4, 5; MERGER, 1; NOTICE, 1, 2; PARTIES, 2; PLEADING, 1-3; RECEIVER, 1; SET-OFF, 1; SPECIFIC PERFORMANCE, 3; TENDER, 1, 2; FRAUDULENT CONVEYANCES, 14, 15.

Municipal Corporations.

1. Public agents can only bind the municipality which they represent when they act within the limits of their chartered authority. *New Jersey and New England Telegraph Co. v. Jersey City*, 117
2. A municipal corporation may always interpose successfully the defence of *ultra vires* to a contract not within the scope of its chartered powers. *Id.*, 117
3. If public agents concede privileges, they must restrict the concession to such as may be given without detriment to the public. This the party to whom the concession is made is bound to understand. *Id.*, 117

Municipal Corporations—Continued.

See MORTGAGE, 17; QUITA TIME, 1; TAXES, 1.

N**Notice.**

1. Recording a mortgage in the records of assignments of mortgages, is not constructive notice. *Parsons v. Lent*, 67
 2. Where one who has no title makes a mortgage, which is recorded, and subsequently acquires title, a subsequent purchaser is not chargeable, under our registry acts, with constructive notice of the mortgage. *Bingham v. Kirkland*, 229
- See ACCIDENT, 4; ESTOPPEL, 1; INSURANCE, 1, 2; MORTGAGE, 1, 13; PLEADING, 5; POSSESSION, 1, 3.

Nuisance.

1. The law does not regard every trifling injury or annoyance as an actionable nuisance. No man is under a legal duty to consult the taste or preferences of his neighbor in the use of his property, but he is bound to respect his neighbor's legal rights. *Demarest v. Hardham*, 469
 2. In such cases, the court should consider the customs of the people, the nature and character of their employments, the uses to which they generally devote their property, and the circumstances and surroundings of the business which is alleged to be a nuisance. What would constitute a nuisance in one place would be perfectly legitimate in another. *Id.*, 469
 3. Complainants and defendant occupied adjoining buildings, the walls touching in places. The force of the defendant's machinery caused the building of the complainants to vibrate to such an extent as to interfere seriously with the business of the complainants.—*Held*, that the defendant was guilty of a nuisance which it was the duty of the court to restrain. *Id.*, 469
- See INJUNCTION, 8; PARTIES, 1.

O.**Orphans Court.**

See APPEAL, 2; EXECUTORS, 3.

P.**Parties.**

1. Several persons may join in a suit to restrain a nuisance which is common to all, and affects each in the same way; but where several persons owning distinct parcels of land, or occupying different dwellings, and having no common interest, seek to restrain a nuisance in consequence of the special injury done to

Parties—Continued.

- each particular property, each must bring a separate suit, and obtain relief, if at all, on his own special wrong. *Demarest v. Hardham*, 469
2. The direction of the statute, that the assets of an insolvent estate shall be distributed ratably among the creditors of the decedent, gives them a lien on such assets, and entitles them to a standing to contest the validity of a chattel mortgage not filed according to the statute. *Currie v. Knight*, 485
3. In a bill filed by certain depositors of an insolvent savings bank (for which a receiver had been appointed), on behalf of themselves and such other depositors as might choose to join therein, against certain of the managers of the bank, to compel the payment of so much of complainant's deposits as they may not realize out of the assets of the bank, two grounds of relief were set up: first, fraudulent public misrepresentations by the defendants, which induced complainants to become and remain depositors, and, second, culpable mismanagement of the bank's funds. On demurrer for misjoinder and non-joinder--*Held*,
- (1) That complainants cannot sue jointly for the misrepresentation, although it was general in character and addressed to the public but they may, for the mismanagement.
- (2) That suit should primarily be brought by the bank, but if it cannot or will not sue, then the depositors may proceed, but since the damages recovered would be assets of the bank, it or its receiver is a necessary party. *Chester v. Halliard*, 341
- See DIVORCE, 2; EXECUTORS, 4; PRACTICE, 1; TENDER, 2.

Partnership.

See FRAUDS AND PERJURIES, 1; INSURANCE, 3; MORTGAGE, 1.

Payment.

1. The acceptance of the promissory note of a debtor, for a precedent debt, will not operate as a discharge or satisfaction of the debt, unless it is agreed that such shall be its effect. *Wildrick v. Swain*, 167
2. The giving of a depositor credit for the amount of the loan on the books of the bank, the same being entered in her pass-book and remaining subject to her check for a long time before the bank closed its doors, was an actual payment of the money to her. And she is not entitled to a deduction from her indebtedness of so much of the borrowed money as remained on deposit when the bank suspended payment. *Hannon v. Williams*, 255
3. A debtor cannot discharge his liability to his creditor by seeking some person whom his creditor happens to owe, and paying his

Payment—Continued.

- debt to him. *Receiver of State Bank v. First National Bank of Plainfield*, 450
See BANK, 1; EXECUTORS, 1.

Pleading.

1. A presumption of payment of a mortgage from lapse of time may be raised by a demurrer, and such a demurrer does not admit the allegations of a bill that both the principal and interest of the mortgage are now due and owing, because such allegations are rather conclusions than averments of facts. *Olden v. Hubbard*, 85
2. Any existing circumstances which would repel such presumption must be averred in the bill. *Id.*, 85
3. If the validity of a release of an assumption of a mortgage (when a decree for deficiency is sought) is questioned, the complainant must frame the issue so as to raise the question. *Vreeland v. Torrey*, 312
4. The defendants filed a bill to restrain complainant from interfering with the height of a certain dam, whereupon complainant instituted a counter-suit to compel defendants to reduce its height. By a decision, rendered in 1879, in defendants' suit, their claim was upheld, and the complainant relegated to law for redress. On motion to dismiss complainant's suit for non-prosecution—*Held*, that the suit cannot be retained for the purpose of compelling defendants to pay the damages which complainant may hereafter recover at law, in case they refuse to pay such damages, because the bill neither asks for nor is adapted to such relief. *McFarlan v. Morris Canal and Banking Co.*, 369
5. A party claiming to be a *bona fide* purchaser, must deny notice not only at the time of his purchase, but also before or at the time when his deed was executed, and consideration paid. *Dean v. Anderson*, 496
See INJUNCTION, 1; MORTGAGE, 14.

Possession.

1. T. H. was in possession of premises before he made his deed to L. H., in 1867, and remained in possession down to the time of making the mortgage to W. W. P., in 1874.—*Held*, that his possession was not notice to W. W. P. of the title of T. H., under the unrecorded deed of 1868, so as to require W. W. P. to search against the acts of T. H. from that time. *Bingham v. Kirkland*, 229
2. When a vendor remains in possession after making his deed, a purchaser from his grantee has a right to rely upon the deed of the vendor in possession, as a complete answer to any inquiry which his possession would suggest. *Id.*, 229

Possession—Continued.

3. The possession which suggests inquiry to a purchaser, and is notice to him of the possessor's interest in the land, is a possession existing at the time of the purchase. *Id.*, 229
See ACCIDENT, 4; ESTOPPEL, 1; GIFT, 1.

Power.

1. No man can set aside the law by his deed or will. He may make any disposition of his property he sees fit, provided he does not attempt to contravene or overthrow the law. *Creveling v. Fritts*, 134
See TRUSTS, 3.

Practice.

1. Suit by receiver of an insolvent bank to recover moneys of the bank received by one of its creditors, subsequently to his appointment.—*Held*, that the complainant could have no relief by petition, but only by bill, and that the fact of his being an officer of the court entitled him to no privilege not accorded to other suitors. *Receiver of State Bank v. First National Bank of Plainfield*, 450
See APPEAL, 1, 2; COSTS, 1-3; CREDITOR'S BILL, 1; EVIDENCE, 2, 3, 5, 6; EXECUTORS, 3; GUARDIAN, 1; INJUNCTION, 5.

Presumption.

See FRAUDULENT CONVEYANCES, 4; PLEADING, 1, 2.

Q.

Quia Timet.

1. Sales of land under municipal assessments based on an unconstitutional statute, and sales, for taxes, to the city for a term of years exceeding that limited by the charter, are clouds on the title of such lands which this court may remove. *Calhoun v. Elizabeth*, 357

R.

Railroad.

See CONSTITUTION, 1; EMINENT DOMAIN, 1.

Receiver.

1. Pending the foreclosure of a mortgage on a farm, a receiver was, with the written consent of the solicitors of all the parties in interest, appointed, with power to let the premises.—*Held*, that he could let the farm for a year without a special order, that being

Receiver—Continued.

the usual term for such leases, and that such lease was neither limited nor terminated by the duration of the suit. *Shreve v. Hankinson*, 413

See CONTRACT, 2; PARTIES, 3; PRACTICE, 1.

Reformation of Instruments.

1. Except under very extraordinary circumstances, a court of equity will not lend its assistance to reform a voluntary deed, or to enforce the specific performance of a voluntary contract. *Woodruff v. Morristown Inst. for Savings*, 174
- See ACCIDENT, 1.

Relief against Judgment.

1. By a written agreement for the exchange of lands, the complainant was to secure to the defendant for his (defendant's) use, one-half of the rye then growing on complainant's land, which was under lease, and by a simultaneous verbal agreement, the growing wheat thereon was reserved to complainant's tenant then on the premises. The deed, which was afterwards given, was a warranty deed, and contained no reservation of the crops at all, because the scrivener regarded it as unnecessary. The defendant, denying the tenant's claim to the wheat, converted it to his own use, whereupon the tenant recovered a judgment against him for its value. Then the defendant recovered a judgment at law in respect thereof, against complainant, for breach of covenant in the deed, and on that judgment a writ of error by complainant is still pending.—*Held*, that complainant having conclusively shown that the wheat was reserved at the time of the exchange, may restrain defendant from further proceeding on or enforcing his judgment at law, and that such right has not been lost by his laches. *Thompson v. Tilton*, 306

Remainder.

See DEVISE, 2, 4; FRAUDULENT CONVEYANCES, 2.

Rules.

208, 429
210, 294

S.**Set-Off.**

1. In this state, it is provided by statute that in a suit by an assignee of a mortgage, all just set-offs and other defences shall be allowed against him which would have been allowed if his assignor had brought the action. *Rev. 708, § 31. Woodward v. Morristown Inst. for Savings*, 174

Set-Off—Continued.

2. A depositor in an insolvent savings bank, who is also a debtor to the institution for money borrowed, is not entitled to set off the amount of his deposit against his indebtedness. The ordinary rules of set-off between debtor and creditor do not apply to the case. *Hannon v. Williams*, 255

See PAYMENT, 2.

Specific Performance.

1. In an exchange of lands, the defendant agreed to cancel certain judgments which were liens on part of his premises, and to secure the difference between the properties in value (\$3,000) by giving complainant a first mortgage on a farm in Delaware, the value of which he grossly exaggerated. He made provision for satisfying the judgments, but never in fact did so, and they are still uncanceled of record. The Delaware mortgage was a second mortgage. It was accompanied by another mortgage, on lands in this state, which he misrepresented as to quantity, to indemnify complainant for loss under the Delaware mortgage. The Delaware property, on a subsequent foreclosure, produced only enough to pay the first mortgage on it. Complainant sold the property covered by the judgments, and warranted the title.—*Held*, that she is entitled to specific performance of the agreement as to canceling the judgments, and also to relief on account of defendant's false and fraudulent representations as to the mortgages, and the \$3,000 were therefore declared a lien on the premises conveyed to defendant, subject to prior *bona fide* encumbrances. *Reiley v. Roberts*, 299
2. In 1876, defendant obtained possession of certain letters, documents &c., alleged to be valuable in establishing complainant's heirship to a foreign estate, for the purpose of investigating the claim, and to prosecute it for a share, if successful. He further agreed to return the papers on demand, but refuses to do so, and has taken no steps to obtain the estate.—*Held*, that the court had power to order the papers to be delivered to complainant. *Pattison v. Skillman*, 344
3. The court will decree specific performance of a contract to give a mortgage upon lands, where the contract, although by parol, has been executed on complainant's part. *Dean v. Anderson*, 496

Statutes of Great Britain.

43 Eliz. c. 4, 104

Statutes of New Jersey (Private).

Highlands and Seabright Turnpike Co.,	<i>P. L. 1875, p. 191,</i>	317
Burlington County Lyceum,	<i>P. L. 1876, p. 262,</i>	327
Mechanics and Laborers Saving Bank,	<i>P. L. 1869, p. 179,</i>	399

Statutes of New Jersey (Public).

Assignment,	<i>Rev. p. 36, § 1,</i>	481
Appeal,	<i>Rev. p. 791, § 176,</i>	526
Corporations,	<i>Rev. p. 189, § 72,</i>	455
Descent,	<i>Rev. p. 300, § 13,</i>	462
Divorce,	<i>Rev. p. 314, § 81,</i>	44
Evidence,	<i>P. L. 1880, § 52,</i>	353
	<i>Rev. p. 379, § 6,</i>	352
Executors,	<i>Rev. p. 398, § 11,</i>	242
	<i>Nix. Dig. p. 308, § 29,</i>	382
Insolvent Debtors,	<i>Rev. p. 499, § 11,</i>	455
Limitations,	<i>Rev. p. 599, § 25,</i>	447
Married Women,	<i>Rev. p. 637, § 4,</i>	127
Mortgages,	<i>P. L. 1880, p.</i>	
	255, 111, 419, 432, 495	
	<i>Rev. p. 708, § 31,</i>	179
	<i>Rev. p. 708, § 34,</i>	437
	<i>Rev. p. 709, § 39,</i>	486
Municipal Corporations—Jersey City,	<i>P. L. 1871, p. 1142 §§ 114,</i>	
	117,	121
Newark,	<i>P. L. 1857, p. 116 § 109.</i>	
Rahway,	<i>P. L. 1865 p. 499,</i>	495
Orphans Court,	<i>Rev. p. 764, § 62, 99, 382, 523</i>	
	<i>Nix. Dig. p. 653, § 70, 100, 382</i>	
	<i>Rev. p. 770, § 81,</i>	486
	<i>Rev. p. 778, §§ 118, 119,</i>	194
	<i>Rev. p. 779, §§ 124, 126,</i>	203
	<i>Rev. p. 776, § 110,</i>	224
	<i>Rev. p. 791, § 176,</i>	512
	<i>Rev. p. 781, § 129,</i>	242
	<i>Rev. p. 781, § 130,</i>	243
	<i>Rev. p. 776, § 113,</i>	244
Surveys,	<i>Nix. Dig. p. 935,</i>	441
Title,	<i>Rev. p. 1189,</i>	358
Trustees,	<i>Rev. p. 1224, § 1,</i>	327

Street.

See CONSTITUTION, 1; MORTGAGE, 17.

Subrogation.

1. After a second mortgage had been taken on certain lands, a payment of part of the principal of the first mortgage was made by a brother of the mortgagor, under an agreement between the holder of the mortgage and the mortgagor and his brother, that the latter should be subrogated to the rights of the mortgagee under the mortgage for those payments.—*Held*, that, as against the holder of the second mortgage, such conventional sub-

Subrogation—Continued.

rogation could be enforced. The payments were, in fact, made after the second mortgage was given. *Shreve v. Hankinson*,

76

Surety.

See ASSIGNMENT FOR CREDITORS, 1; EXECUTORS, 4; GUARDIAN, 1; MORTGAGE, 3.

T.**Taxes.**

1. Municipal taxes assessed on mortgaged lands in Rahway, after the mortgage was given, are liens on the premises paramount to the mortgage. *Allen v. Allen* 493

Tender.

1. After a decree in foreclosure had been obtained and execution placed in the sheriff's hands, the owner of the equity of redemption in all of the premises, except a small parcel, tendered to the holder of the mortgages, and also to the sheriff, the amount due thereon, which was refused.—*Held*, that the fact that there was error in the decree constituted no ground for refusing the tender, and the sheriff was directed to accept, in satisfaction of the mortgages under the execution, the amount due at the time of the tender. *Foster v. Union National Bank*, 371
2. A bill to redeem a past-due mortgage, and for an account of the rents and profits of the premises during the mortgagee's possession, and for a discovery as to the present holder of the mortgage, was filed by the mortgagor. On demurrer—*Held*, that complainant was entitled to the account sought, but not to redeem; it appearing by the mortgagee's answer that he had assigned the mortgage to a person whom he mentioned. But a tender of the amount due on the mortgage having been made to the mortgagee before the filing of the bill, held, also, that such tender bound the assignee of the mortgage so far as interest thenceforward was concerned, since he had neglected to have his assignment recorded, and the mortgagee, on inquiry at the time of the tender, refused to divulge his name, and the mortgagor had no notice of the assignment. The cause was directed to stand over to enable the mortgagor to bring in the assignee. *Fritz v. Simpson*, 436

See MORTGAGE, 2.

Time.

See APPEAL, 2; EVIDENCE, 2; EXECUTORS, 3, 18.

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Trusts and Trustees—Continued.

another savings bank: "This account is in trust for Frank B. Smith," and signed it with her name. She kept both pass-books in her own possession, and drew the dividends and part of the deposits down to 1878, when she became insane. Complainant is her nephew, and understood that, although the funds were deposited in trust for him, he was to have no part thereof until Rachel's death.—*Held*, that he had no claim to be protected during Rachel's lifetime, against her or her guardian drawing the funds. *Smith v. Speer*, 336

See CORPORATION, 3, 4; DOWER, 3; EXECUTORS, 8; HUSBAND AND WIFE, 4; MERGER, 1; MORTGAGE, 21.

U.**Undue Influence.**

1. When a person whose mind is enfeebled by disease or old age, is so placed as to be subjected to the influence of another person, and makes a voluntary disposition of property by gift in favor of such person, the court requires proof of the fact that the donor understood the nature of the act, and that the act was not done through the influence of the donee. *Haydock v. Haydock*, 570
2. Where it is obvious that a gift made by such person is intended to operate as a will, it presents an additional reason for imposing upon the donee the burden of showing convincingly the validity of the act. *Id.*, 570

V.**Variance.**

1. An answer to a foreclosure bill stated that the complainants, in consideration of \$500, stipulated "to agree to the conditions of the mortgage."—*Held*, that the allegation was not sustained by proof that the complainants, in consideration of \$500, agreed to take the mortgage in suit in substitution for another of the same amount on other property. *Naar v. Union and Essex Land Co.*, 111
See APPEAL, 1.

W.**Waiver.**

See COSTS, 3; INSURANCE, 3.

Wills.

1. A testator eighty-five years old when he died, and blind for the last fifteen years of his life, lived for many years and until his death with one of his sons, who took care of him. He left two sons, several daughters and grandchildren surviving.—*Held*, no evidence of incapacity that he gave all of his land to his two

Wills—Continued.

sons, charged, however, with legacies to his daughters and grandchildren, although, by a codicil executed three years before his death he reduced all of the legacies, because he apprehended that the legacies and his own debts would prove too great a burden for his sons, when, in fact, at that time, a part of his lands had increased considerably in speculative value; nor the omission of some of his grandchildren from his bequests, nor the fact that the disposition of his property is grossly unequal.

Collins v. Osborn,

See CHARITY, 1-3; DEVISE AND LEGACY, 1-4; UNDUE INFLUENCE, 2.

Words.

"Charge," *Clawson v. Riley,*
 "Discount," *Jones v. State Bank,*
 "Purchase," *Dean v. Anderson,*
 "Request," *Eddy v. Hartshorne,*

35

54

504

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